THE

PRACTICE ACT

OF

CALIFORNIA,

ENTITLED

"AN ACT TO REGULATE PROCEEDINGS IN CIVIL CASES IN THE COURTS OF JUSTICE IN THIS STATE,"

AS PASSED APRIL 29, AND AMENDED MAY 18, 1853; MAY 18, 1854; APRIL 28, MAY 4 AND MAY 7, 1855.

WITH NOTES, APPENDIX, AND INDEX.

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"The Law Practice is imperfect at the best."—H. W. WARNER.

SAN FRANCISCO:
WHITTON, TOWNE & CO., PRINTERS, EXCELSIOR BOOK AND JOB OFFICE,
151 CLAY STREET, NEAR MONTGOMERY.
1856.

Entered according to Act of Congress,
In the Year of our Lord One Thousand Eight Hundred and Fifty-six,
By HENRY J. LABATT,
In the Clerk's Office of the District Court, for the Northern District of California.

INTRODUCTION.

In presenting this work to the profession, the object of the compiler has been to lessen the difficulty experienced in the preparation and trial of causes, from a want of knowledge of our code of civil practice, by attorneys assembled here from the various States of the Union. This difficulty induced him to collect such precedents as our Courts had established, and such others as would prove useful in the application of the code.

Authorities are added, which have emanated from the Fourth, Sixth, and Twelfth Judicial District Courts, and the Superior Court of the City of San Francisco, which will elucidate points of practice, not yet settled on appeal by the Supreme Court.

By letter addressed to each of the District Judges in the State, they were respectfully requested to furnish such decisions upon practice as they had made, which were not yet adjudicated upon in the Supreme Court, and such as have been received have been given in the following pages.

A copious index will be found, refering to each section, under the head of any principal word or phrase therein.

An Appendix containing a digest of decisions on "Homestead," and "Mining and Water Courses," in this State, and the Rules of the Supreme Court, has been added, as useful to the profession.

The amendments of 1855 are incorporated in the body of the Act. In the references to the decisions of the Supreme Court since 1854, the compiler has used the pamphlet edition of the Sacramento Union, which must excuse any incorrectness that otherwise might have been avoided.

HENRY J. LABATT,
101 Merchant Street.

San Francisco, April, 1856.

EXPLANATIONS.

† Denotes the sections amended in 1853.
‡ " " " " " 1854.
¶ " " " " " 1855.

ERRATA.

N. B. A list of errors occuring in this edition, is appended, trusting that those who use this work will correct by it, and avoid inconvenience.

Page 17, 11th line, for "1 *Denio*," read "1 *Barb. Ch. Pr.*"
" 18, 42d " " "*he does*," read "*he does not.*"
" 20, 15th " " "*his*," read "*its.*"
" 25, 59th " " "*McNally* vs. *Nott*," read "*McNally* vs. *Mott.*"
" 33, 20th " " "*to*," read "*by.*"
" 77, 3d " " "*bond*," read "*land.*"
" 106, 22d " " "*Tuolumne*," read "*Jarvis.*"
" xxviii, MANDATE, 13th line, for "*sealed*," read "*sent.*"

4 ‡ ¶. Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this Act; but in suits brought by the assignee of an account, unliquidated demand, or thing in action not arising out of contract, assigned subsequently to the first day of July, 1854, the assignor shall not be a witness on behalf of the plaintiff.

The assignee of an unliquidated account must sue for his own use in the name of the assignor.—*Hackett* vs. *Carpentier*, 4th Dist. Court.

No formality is necessary to effect the transfer of a chose in action. Any transaction between the contracting parties, which indicates their intention to pass the beneficial interest in the instrument from one to the other, is sufficient for that purpose; a debt or claim may be assigned by parol as well as by writing.—2 Sto. Eq. 311. *Heath* vs. *Hull*, 4 Taunt. 326. *Slaughter* vs. *Faust*. 5 Blackf. 380. *Montgomery* vs. *Dillingham*, 3 Sme & M. 647. *Hastings* vs. *McKinley*, 1 Smith 273. *Clark* vs. *Downing*, ib. 406. *James* vs. *Chalmers*, 5 Sand. 52.

The assignor cannot be a witness for the assignee.—*Griffin* vs. *Alsop*, 4 Cal. 406.

5. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense, existing at the time of, or before notice of the assignment; but this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith, and upon consideration before due.

The admissions or declarations of an assignor of a chose in action, made while he is the holder and before assignment, are evidence against his assignee, and all claiming under him.—2 Phill. Ev. (C. & H. Ed.) note 446, pp. 387, 644, 663. *Brown* vs. *Magraw*, 12 Sme. & M. 267. *Grand Gulf Bank*, vs. *Wood*, ib. 482.

The assignee of a cause of action, assigned after action brought, is liable to the defendant for costs, if he (the assignee) proceed in the action after the assignment, (Cow. 17); and in such a case he takes the demand *cum onere*, and is liable for the costs which had accrued before, as well as those which arise after the assignment.—*Miller* vs. *Franklin*, 20 Wend. 630

6 ‡. An Executor or Administrator, or Trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person or persons for whose benefit the action is prosecuted. A Trustee of an express trust within the meaning of this Section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

Mercantile factors, or agents doing business for others but in their own names, are trustees of an express trust.—*Grinnell* vs. *Schmidt*, 3 C. R. 19. 2 Sand. 706.

Also, an auctioneer *Bogart* vs. *O'Regan*, 1 Smith 590. *Minturn* vs. *Main*, 3 Seld. 220.

Bonds taken in the name of the people of the state, for the benefit of others, should be prosecuted in the name of the people, and not in the name of the party in interest.—*Bos.* vs. *Seaman*, 2 C. R. 1.

7. When a married woman is a party her husband shall be joined with her; except that,

1st. When the action concerns her separate property she may sue alone;

2d. When the action is between herself and her husband she may sue and be sued alone.

1st. Sustained, as referring to property in the Statute denoted separate property; does not refer to rents accruing &c.—*Snyder* vs. *Webb*, 3 Cal., 83.

When a married woman sues without her next friend, the objection may be taken at any stage of the suit.—*Coit* vs. *Coit*, 2 Code Rep., 94; *Willis* vs. *Underhill*, 6 Pr. R., 396; but the Court may in its discretion, and upon terms, allow an appointment *nunc pro tunc*.

2d. This provision must be construed beneficially.—*Kashaw* vs. *Kashaw*, 3 Cal., 312.

In an action to recover real property when the wife is the owner of the fee and the husband tenant by the courtesy initiate, the husband and wife may and should join in the action.—*Ingraham* vs. *Baldwin*, 12 Barb., 9.

In an action to foreclose a mortgage executed by husband and wife on the lands of the wife, both should be sued.—*Conde* vs. *Shepheard*, 4 Pr. R., 75; *Conde* vs. *Nelson*, 2 Code Rep., 58.

8. If a husband and wife be sued together the wife may defend for her own right.

9. When an infant is a party he shall appear by guardian, who may be appointed by the Court in which the action is prosecuted, or by a Judge thereof, or a County Judge.

The taking judgment against an infant as for want of an answer without appointing a guardian ad litem is an irregularity, and the plaintiff's want of knowledge that the defendant is a minor will not serve to make the judgment regular. The judgment so taken will be set aside on motion and without imposing terms.—*Kellogg* vs. *Klock*, 2 Code Rep., 27.

10. The guardian shall be appointed as follows:

1st. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon application of a relative or friend of the infant;

2d. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, and neglect so to apply, then upon the application of any other party to the action, or of a relative or friend to the infant.

Where the infant is plaintiff he must have a guardian appointed before the action is commenced.—*Hill* vs. *Thatcher*, 2 Code Rep., 3.

11. A father, or, in case of his death or desertion of his family, the mother may maintain an action for the injury or death of a child; and a guardian for the injury or death of his ward.

12. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this Act.

Different persons owning separate tenements, affected by a nuisance, may join in injunction to restrain the continuance of it.—*Peck* vs. *Elder*, 3 Sand, 126.

13. Any person may be made a defendant who has, or claims, an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

When several defendants are sued on a joint liability, there can only be a joint recovery and judgment; and no judgment can be entered by plaintiff, until all the defendants served have had the full time to answer.—*Jacques* vs. *Greenwood*, 1 Abbott, 230.

An appeal does not lie from an order making a new party defendant.—*Beck* vs. *San Francisco*, 4 Cal., 375.

The plaintiff in ejectment may sue one or more defendants, and they may answer separately, or demand separate verdicts.—*Winans* vs. *Christy*, 4 Cal., 70.

Parties may be made defendants when their rights are separate and distinct, and where plaintiff claims under one general right, but they cannot be made plaintiffs. —*Brannan* vs. *Mesick*, 6th District Court.

14. Of the parties to the action, those who are united in interest shall be joined as plaintiffs, or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

Bouton vs. *City of Brooklyn*, 15 Barb., 375; *Von Schmidt* vs. *Huntington*, 1 Cal., 55.

15. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

16. An action shall not abate by the death, or other disability of a party; or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or disability of a party, the court on motion may allow the action to be continued by or against his representative or sucessor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action.

A suit abates by sentence to State's Prison.—*O'Brien* vs. *Hagan*, 1 Duer, 664.

Leave of the court to continue an action under this section is equally necessary, whether the continuance is sought before or after the expiration of the year.—*Johnson* vs. *Williams*, 2 Abbott, 229.

17. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by

saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in.

A Court of Equity will not permit litigation by piece-meal. The whole subject matter and all the parties should be before it, and their respective claims determined once and forever.—*Wilson* vs. *Lassen*, 5 Cal., 14.

TITLE II.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

18. Actions for the following causes shall be tried in the county in which the subject of action or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this act:

1st. For the recovery of real property, or of an estate, or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property:

2d. For the partition of real property:

3d. For the foreclosure of a mortgage of real property.

Vallejo vs. *Randall*, 5 Cal., 82.

19. Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1st. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offence committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offence was committed:

2d. Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, does anything touching the duties of such officer.

An action by the people and prosecuted by the Attorney General is within the second subdivision of this section.—*The People* vs. *Hayes*, 7 Pr. R., 248.

It is upon the trial, that the objection must be raised, and the omission of the defendant to raise it then must be regarded as a waiver by which he is concluded.—*Howland* vs. *Willetts*, 5 Sand., 219.

20. In all other cases, the action shall be tried in the county in which the parties, or some of them, reside at the commencement of the action;

or if none of the parties reside in the State, the same may be tried in any county which the plaintiff may designate in his complaint; subject, however, to the power of the court to change the place of trial, as provided in this act.

In an action of the nature of a quo warranto, the place of trial may properly be laid in any county of the State.—*People* vs. *Cook*, 6 Pr. R., 448.

21. The court may, on motion, change the place of trial in the following cases:—

1st. When the county designated in the complaint is not the proper county.

2d. When there is reason to believe that an impartial trial cannot be had therein.

3d. When the convenience of witnesses and the ends of justice will be promoted by the change.

4th. When from any cause the judge is disqualified from acting in the action.

1st. Six months after answer filed, is too late to raise objections as to venue in the county.—*Toombs* vs. *Randall*, 3 Cal. 438.

The demand for change of venue after an answer, may be disregarded.—*Millighan* vs. *Brophy*, 2 Code R. 118.

The demand may be made simultaneously with the service of an answer.—*Mairs* vs. *Remsen*, 3 Code R. 138.

In general, all the defendants should unite in making the motion.—*Sailly* vs. *Hutton*, 6 Wend. 508. *Legg* vs. *Dorsheim*, 19 Wend. 700.

2d. The granting of a change of venue is discretionary with the court below, subject to review only in cases of gross abuse.—*Sloan* vs. *Smith*, 3 Cal. 410. *Commisky* vs. *White*, 5 Cal 15.

The affidavits should state sufficient facts to draw from the court its own inference as to the impartial trial.—*Sloan* vs. *Smith*, 3 Cal. 410.

It was not error for the court to proceed with the trial, after notice of appeal from its decision, refusing a change of venue.—*Hubbard* vs. *Chipman*, 6 Cal. Jan. T.

TITLE III.

OF THE MANNER OF COMMENCING CIVIL ACTIONS.

For suits against a county, service of process, &c., see Acts 1854, p. 194; contra, *Hunsacker* vs. *Borden*, 5 Cal. July Term, p. 62.

22 ¶. Civil actions in the District courts, Superior court of the City of San Francisco, and the County courts, shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought,

and the issuance of a summons thereon. Provided that after the filing of the complaint, a defendant in the action may appear, answer and demur, whether the summons has been issued or not, and such appearance, answer or demurrer, shall be deemed a waiver of summons.

Where a summons was issued and served in the morning, by which the defendants were cited to appear and answer the complaint in the court of First Instance, at 10 o'clock, and judgment was rendered against them at 9 o'clock on the morning of the same day: held, that the judgment was irregular, and should be reversed, notwithstanding the court offered them permission to come in at a subsequent day, and make their defense.—*Parker* vs. *Shephard, et al.*, 1 Cal. 131.

Lodging the summons with the sheriff, with intent that it should be served, is sufficient.—*Gregory* vs. *Wiener*, 1 Code Rep. N. S. 210.

23. The clerk shall endorse on the complaint, the day, month, and year the same is filed; and at any time after the filing, the plaintiff may have a summons issued. The summons shall be signed by the clerk, and directed to the defendant, and be issued under the seal of the court.

24 ‡. The summons shall state the parties to the action, the court in which it is brought, the county in which the complaint is filed, and require the defendant to appear and answer the complaint within the time mentioned in the next section, after the service of summons, exclusive of the day of service, or that judgment by default will be taken against him, according to the prayer of the complaint, briefly stating the sum or other relief demanded in the complaint.

If the summons be radically defective, it will not support a judgment by default.—*The State* vs. *Woodlief*, 2 Cal. 241.

25. The time in which the summons shall require the defendant to answer the complaint, shall be as follows:

1st. If the defendant is served within the county in which the action is brought, ten days.

2d. If the defendant is served out of the county, but in the district in which the action is brought, twenty days.

3d. In all other cases, forty days.

3d. A judgment will be reversed on appeal rendered before the time of service has expired.—*Burt* vs. *Scrantom*, 1 Cal. 416.

26. There shall also be inserted in the summons a notice, in substance as follows:

1st. In an action arising on contract for the recovery only of money or damages, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint.

2d. In other actions, that if the defendant fail to answer the complaint the plaintiff will apply to the court for the relief demanded therein.

A mistake in the form of a summons is waived by the unconditional appearance of the defendant.—*Dix* vs. *Palmer*, 3 Code Rep. 214. 5 Pr. R. 233.

27. In an action affecting the title to real property, the plaintiff at the time of filing the complaint, or at any time afterwards, may file with the Recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.

28 ‡ ¶. The summons shall be served by the Sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought, or by any white male citizen over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided; a copy of the complaint, certified by the Clerk, shall be served with the summons. When the summons shall be served by the Sheriff or his deputy, it shall be returned with the certificate or affidavit of the officer, of its service, and of the service of the copy of the complaint, to the office of the Clerk, from which the summons issued. When the summons is served by any other person as before provided, it shall be returned to the office of the Clerk from which it issued, with the affidavit of such person of its service, and of the service of a copy of the complaint. If there be more than one defendant to the action, and such defendants reside within three miles of the County Clerk's office, a copy of the complaint need be served only on one of the defendants.

The date of the return of the sheriff is sufficient, if defendant's attorney accepts service of the summons, and attached no date thereto.—*Crane* vs. *Brannan*, 3 Cal. 192.

The return of a sheriff or other person, of the service of summons, is not conclusive against a defendant.—*Van Rensselaer* vs. *Chadwick*, 7 Pr. R. 297.

29. The summons shall be served by delivering a copy thereof, attached to the certified copy of the complaint, as follows:

1st. If the suit be against a corporation, to the President or other head of the corporation, Secretary, Cashier, or managing Agent thereof.

2d. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian; or if there be none within the State, then to any person having the care and control of such minor, or with whom he resides, or in whose service he is employed.

3d. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such guardian.

4th. In all other cases, to the defendant personally.

Service of a summons upon an elector on an election day, is a void service.—*Meeks* vs. *Noxon*, 1 Abbott, 280; *Hastings* vs. *Farmer*, 4 Coms, 296.

Service of summons on Sunday would be a void service.—*Field* vs. *Park*, 20 Johns' R., 140.

30. When the person on whom the service is to be made, resides out of the State, or has departed from the State; or cannot, after due diligence, be found within the State; or conceals himself to avoid the service of summons, and the fact shall appear by affidavit to the satisfaction of the court, or a Judge thereof, or a County Judge, and it shall in like manner appear, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or Judge may grant an order that the service be made by the publication of the summons.

31. The order shall direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week: *Provided*, that publication against a defendant residing out of the State, or absent therefrom, shall not be less than three months. In case of publication where the residence of a non-resident or absent defendant is known, the court or Judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the State, shall be equivalent to publication and deposit in the post-office. In either case, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money, the court in its discretion may, instead of ordering publication, or may, after publication, appoint an attorney to appear for the non-resident, absent, or concealed defendant, and conduct the proceedings on his part.

The defendant has forty days' time to answer, after the service of the summons is completed by three months' publication.—*Grewell* vs. *Henderson*, 5 Cal., 87; *Dykers* vs. *Woodward*, 7 Pr. R. 313.

When the service is made out of the State, though made by a sheriff, it should be returned with his affidavit of service.—*Thurston* vs. *King*, 1 Abbott, 126.

32. Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1st. If the action be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served; or,

2d. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

33. Proof of the service of the summons shall be as follows:

1st. If served by the sheriff or his deputy, the affidavit or certificate of such sheriff or deputy; or,

2d. If by any other person, his affidavit thereof; or,

3d. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited; or,

4th. The written admission of the defendant.

34. In case of service otherwise than by publication, the certificate or affidavit shall state the time and place of the service.

35. From the time of the service of the summons and copy of complaint in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him.

An appearance by attorney amounts to a waiver of service.—*Suydam* vs. *Pitcher*, 4 Cal., 280.

A voluntary and general appearance, besides being equivalent to a personal service of the summons is a waiver of all defects in summons and previous proceedings.—*Webb* vs. *Mott*, 6 Pr. R., 439; *Dix* vs. *Palmer*, 5 ib., 233; 3 Code Rep., 214; *Hyde* vs. *Patterson*, 1 Abbott, 248.

TITLE IV.

OF THE PLEADINGS IN CIVIL ACTIONS.

36. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

Pleadings must be strongly taken against the pleader.—*Chipman* vs. *Emeric*, 5 Cal., 12.

37. All the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this Act.

38¶. The only pleading on the part of the plaintiff shall be the complaint, or demurrer to the defendant's answer, and the only pleading on the part of the defendant shall be the demurrer, or the answer. The demurrer or answer of the defendant shall be filed with the clerk of the court, and a copy thereof served upon the plaintiff or his attorney: *Provided*, the plaintiff or his attorney reside within the county where the action is pending.

The attorney of a plaintiff asking for a default when answer has been filed, but no copy served, shall file his affidavit to that effect, whereupon the clerk shall enter judgment as upon failure to answer.—*Wilson* vs. *Buckelew*, 12 Dist. Court.

39. The complaint shall contain:

1st. The title of the action, specifying the name of the court and the name of the county in which the action was brought, and the name of the parties to the action, plaintiff and defendant.

2d. A statement of the facts constituting the cause of action, in ordinary and concise language.

3d. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof shall be stated.

1st. The statement of the place of trial (and name of the court) in the complaint is essential for many purposes of the suit.—*Merrill* vs. *Grinnell*, 10 Pr. R., 32.

2d. In an action upon a promise to pay money, the complaint should aver consideration or indebtedness.—*Shafer* vs. *Bear River Co.*, 4 Cal., 294.

A complaint should state the facts of a case full enough to enable the court on proof or admission of the facts set forth, to grant the relief sought.—*Tallman* vs. *Green*, 3 Sand., 438.

The plaintiff must aver every fact necessary to show a right to recover and every such necessary averment must be proved in some way.—*Murdock* vs. *Chenango Co. Mut. Ins. Co.*, 2 Coms., 216.

The plaintiff is to state in his complaint the facts which constitue the cause of action, and nothing more.—*Clark* vs. *Harwood*, 8 Pr. R., 472.

Where, on appeal, the complaint is so radically defective as not to authorize the judg-

ment of the court below, a new trial may be granted, with leave to the plaintiff to amend his complaint, on such terms as the court below may deem just.—*Sterling* vs. *Hanson*, 1 Cal., 478.

Although the prayer of a bill be inartificially framed, the court will, under the general prayer for relief, disregard mistakes, and grant such relief as will conform to the bill.—*Truebody* vs. *Jacobson*, 2 Cal., 269.

One partner cannot sue another for a partnership transaction, without praying for an account and a settlement of the partnership transaction.

If the complainant do not show a good cause of action, the judgment will be reversed though no objection be taken below.—*Russell* vs. *Ford*, 2 Cal. 86; *Nugent* vs. *Locke*, 4 Cal. 318; *Stone* vs. *Fouse*, 3 Cal. 292; *Buckley* vs. *Carlisle*, 2 Cal. 420.

The statute requiring the complaint to contain a statement of the facts constituting a cause of action in ordinary and concise language, is only declaratory of the common law.—*Godwin* vs. *Stebbins*, 2 Cal. 103.

A promissory note was made before the Act of 1851, (which makes the 4th of July a non-juridical day,) which fell due on the 1st of July, and was payable on the fourth; held, that notice of non-payment on the 3d was premature, and ineffectual to charge the endorser.—*Toothaker* vs. *Cornwall*, 3 Cal. 144.

Where a bill disclosed that the same subject matter had been litigated between the same parties in a prior suit, and that in said suit, the plaintiff in this suit, had set up the same equity which he claims by this bill, the bill was ordered to be dismissed.

The allegations of ignorance in making the necessary averments, or of insufficient conduct, in the prosecution of a former suit, does not constitute ground for relief in chancery.—*Barnett* vs. *Richey*, 3 Cal. 327.

Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "The same being public land of the United States." That subsequently H., a foreigner, built a house and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and plaintiff prays an injunction, and damages for the occupation. Held, that the complaint sets forth no principle on which to base a claim.—*O'Conner* vs. *Corbett*, 3 Cal. 370.

Where the declaration was upon a note, and there was but one count, and the court found that the note was never given, but that the indebtedness of defendant to plaintiff was for merchandise sold. Held, that the finding was against the averment, and could not support the judgment.—*Lewis* vs. *Myers*, 3 Cal., 475.

A declaration is insufficient, which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice.—*Lightstone* vs. *Laurencel*, 4 Cal., 277.

40. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1st. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2d. That the plaintiff has not legal capacity to sue; or,

3d. That there is another action pending between the same parties for the same cause; or,

4th. There is a defect of parties, plaintiff or defendant; or,

5th. That several causes of action have been improperly united; or,

6th. That the complaint does not state facts sufficient to constitute a cause of action.

A demurrer is only appropriate when the ground of the demurrer is apparent on the face of the pleading.—*Getty* vs. *Hudson R. R. R. Co.*, 8 Pr. R., 177.

Where a suit is brought upon a bill of lading made to the plaintiff jointly with another, the plaintiff has no separate cause of action.—*Mayo* vs. *Stansbury*, 3 Cal. 465.

An omission to allege delivery in a suit on bond, can be taken advantage of only by demurrer.—*Garcia* vs. *Satrustegui*, 4 Cal., 244.

Irrelevancy is no ground for demurrer.—*Watson* vs. *Husson*, 1 Duer, 242; *Smith* vs. *Greenin*, 2 Sand., 702.

Uncertainty is no ground for demurrer.—*Richard* vs. *Edick*, 17 Barb., 261.

Duplicity is no ground for demurrer.—*Welles* vs. *Webster*, 9 Pr. R., 253; *Gooding* vs. *McAlister*, ib. 123.

If a demurrer be to the whole complaint, and any part of the complaint is good, the demurrer must be over-ruled. *Cooper* vs. *Clason*, 1 Code Rep. N. S., 347; *Butler* vs. *Wood*, 10 Pr. R., 222; *Freeland* vs. *McCullough*, 1 Denio, 414; *Whiting* vs. *Heslep*, 4 Cal. 327.

A demurrer may be good as to one defendant, and bad as to another.—1 Denio, 108.

A judgment on demurrer is not a bar to a subsequent action, but only where it determines the whole merit of the case.—*Robinson* vs. *Howard*, 5 Cal., 86.

Objections to a declaration when they arise from matters of form are not subject of a demurrer.—*Otero* vs. *Bullard*, 3 Cal., 188; *Howell* vs. *Frazier*, 1 Code Rep. N. S., 270.

When a demurrer is put in and over-ruled, and defendant answers, the answer is a waiver of demurrer.—*Deboom* vs. *Priestly*, 1 Cal., 206; *Pierce* vs. *Minturn*, ib. 470; *Brooks* vs. *Minturn*, ib. 481.

When the declaration states a condition precedent, and fails to aver performance, the defect must be taken advantage of by demurrer.—*Hoppe* vs. *Stout*, 2 Cal., 460.

3d. Where a party is suing in two courts for the same cause of action, he may be compelled to elect in which court he will proceed.—*Hammond* vs. *Baker*, 1 Code Rep. N. S., 105.

The parties may be plaintiff and defendant in one suit, and defendant and plaintiff in the other.—*Groshons* vs. *Lyon*, 16 Barb., 461; 1 Code Rep. N. S. 348.

4th. After demurrer and the pleadings are amended by striking out a party demurred to, the defendant cannot object to the non-joinder of that party.—*Powell* vs. *Ross*, 4 Cal., 197.

A defendant cannot demur because others are improperly made defendants.—*Pinkney* vs. *Wallace*, 1 Abbott, 82; *Voorhies* vs. *Baxter*, ib. 44.

6th. It seems now to be settled, that a demurrer authorized by this subdivision need only state the language thereof.—*Haire* vs. *Baker*, 1 Selden, 357; *Johnson* vs. *Wetmore*, 12 Barb., 433; *Noxon* vs. *Bentley*, 7 Pr. R., 316; *Hyde* vs. *Conrad*, 3 Code Rep., 162. Contra: *Grant* vs. *Lasher*, 2 Code Rep., 2; *Hunter* vs. *Frisbie*, ib. 59; see pro and con., *Purdy* vs. *Carpenter*, 6 Pr. R. 361.

But should a defendant state what facts are needed, then he cannot insist on others at the argument of the demurrer.—*Nellis* vs. *De Forest*, 16 Barb., 65.

41. The demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded.

42. The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein, and answer the residue; or may demur and answer at the same time.

After an extension of time to answer, the defendant may put in a demurrer instead of answering.—*Broadhead* vs. *Broadhead*, 3 Code Rep., 8.

The defendant cannot demur to part and answer another part of a complaint which contains but one cause of action stated in one count. In other words, a defendant cannot demur to part of a cause of action.—*Ingraham* vs. *Baldwin*, 12 Barb. 9.

43¶. If the complaint be amended, a copy of the amendments shall be filed, or the court may, in its discretion, require the complaint as amended, to be filed, and a copy of the amendments shall be served upon

every defendant to be affected thereby, or upon his attorney; the defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases.

44. When any of the matters enumerated in section forty do not appear upon the face of the complaint the objection may be taken by answer.

45. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

The failing to demur does not waive the right of the defendant to object on the trial for the first time that the complaint does not state facts sufficient to constitute a cause of action.—*Higgins* vs. *Freeman*, 2 Duer, 650; *Montgomery County Bank* vs. *Albany City Bank*, 3 Seld., 459.

An incurable defect is not waived by any pleading but may be taken advantage of whenever the parties are before the court either at special term by motion, or on the trial at circuit by motion in arrest after verdict.—*Burnham* vs. *DeBovorse*, 8 Pr. R., 159.

46 ‡. The answer of defendant shall contain:

First: If the complaint be verified, a specific denial to each allegation of the complaint, controverted by the defendant, or a denial thereof, according to his information and belief; if the complaint be not verified, then a general denial to each of such allegations, but a general denial shall only put in issue the material and express allegations of the complaint;

Second: A statement of any new matter constituting a defense, in ordinary and concise language.

The admission by an attorney of record of correctness of the amount due for which judgment is taken, when not done in fraud of the rights of his client, must destroy the effects of the denial in answer.—*Taylor* vs. *Randall*, 5 Cal., 9.

Where defendant's answer is a general denial, it has the same influence as a plea at common law of the general issue, and accord and satisfaction may be given in evidence. *Gavin* vs. *Annan*, 2 Cal., 494; *McLarren* vs. *Spalding*, ib. 510.

A specific denial of one or more allegations is an admission of all others well pleaded.—*De Ro* vs. *Cordes*, 4 Cal., 117.

The effect of this general denial is, that any matter can be given in evidence which shows that plaintiff never had any cause of action, and most matters in discharge of the action.—*McLarren* vs. *Spalding*, 2 Cal., 510.

The special defence of "unworkmanlike manner" must be set up in the answer. The contract, and not whether the article is fit for use, must rule.—*Kendall* vs. *Vallejo*, 1 Cal., 371.

A defendant should set forth the true nature of his defense in his answer, and in case he does, should not be permitted to insist upon it.—*Walton* vs. *Minturn*, 1 Cal., 362.

The answer and demurrer are different pleadings, and by the fact that they are on one paper and in form connected they do not lose their distinct character.—*Howard* vs. *Michigan Southern R. R. Co.*, 5 Pr. R., 207.

Where the cause of action is divisible, or several causes stated, the defendant may

deny part and leave residue unanswered.—*Smith* vs. *Shufeldt*, 3 Code Rep., 175; *Snyder* vs. *White*, 6 Pr. R., 321; *Tracy* vs. *Humphrey*, 3 Code R., 190.

The new matter must be facts, and if fraud is alleged, the facts and circumstances of the fraud must be set forth.—*McMurray* vs. *Gifford*, 5 Pr. R., 14.

If the new matter occurs after answer, the defence must be made by a supplemental answer.—*Hornfager* vs. *Hornfager*, 1 Code R. N. S., 180.

Where matter of defence occurs after the commencement of the action and before answer it may be set up by answer.—*Beals* vs. *Cameron*, 3 Pr. R., 414.

Matters in avoidance must be specially pleaded.—*Gaskell* vs. *Moore*, 3 Cal. 334.

When a complaint alleges that the plaintiff was in the quiet and peacable possession of premises, and was dispossessed by defendants, by force, or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint or confession of them, should state distinctly and positively, new matter sufficient to avoid them.—*Ladd* vs. *Stevenson*, 1 Cal., 18.

When a chancery suit is heard on bill and answer, all the allegations in the answer, whether upon knowledge or information and belief, are to be taken as true. If the complainant wishes to dispute any of the allegations in the answer, he must file a replication, and thus enable the defendant to establish them by proof, if he can.—*Von Schmidt* vs. *Huntington*, 1 Cal., 55.

The complaint alleged the making of a note and the indorsement thereof, and the answer was a general denial in the terms of the old general issue in assumpsit, that the defendant undertook and promised, in manner, form, &c.; Held, that the plaintiffs would have been entitled to judgment, on a motion in the court below to strike out the answer as a nullity; but, held, further, that he should have raised his objection to the answer, in the court below, and had it passed upon, and that having rested his cause at the trial on the ground of want of an affidavit, he will not be permitted to say on appeal for the first time that the answer does not, in a proper form, controvert the allegations of the complaint.—*Grogan* vs. *Ruckle*, 1 Cal., 194.

It is no defence to a suit on a negotiable bill of exchange, that the suit is brought in the name of a mere agent or stranger, or a fictitious person.—*Lineker* vs. *Ayeshford*, 1 Cal., 76.

A vendee may avail himself of fraud, breach of warranty, or failure of consideration, by way of defence, in action upon contract.—*Flint*, et al, vs. *Lyon*, 4 Cal., 17.

47. The counter claim mentioned in the last section shall be one existing in favor of the defendant, and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1st. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action:

2d. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

A set-off must be pleaded in answer.—*Bernard* vs. *Mullot*, 1 Cal., 368.

After a set-off is pleaded plaintiff cannot discontinue as a matter of course.—*Cockle* vs. *Underwood*, 1 Abbot, 1.

48. When cross demands have existed between persons, under such circumstances, that if one had brought an action against the other, a counter claim could have been set up, neither shall be deprived of the benefit thereof, by the assignment or death of the other; but the two demands be deemed compensated, so far as they equal each other.

49. The defendant may set forth by answer as many defenses and counter claims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner in which they may be intelligibly distinguished.

The separate grounds of defense, separately stated, take the place of separate pleas. —*Cobb* vs. *Frazee*, 4 Pr. R., 413.

A defendant may avail himself of as many defenses as he may have, but each must be separately stated, and be consistent in itself.—*Porter* vs. *McCreedy*, 1 Code Rep. N. S., 88.

50‡. When the answer contains new matter, the plaintiff may demur to the same for insufficiency, stating in his demurrer the grounds thereof, and he may also demur to one or more of several defenses set up in the answer; sham and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the Court, in his discretion may impose.

A sham answer and defense is one that is false in fact and not pleaded in good faith. It may be perfectly good in form, and to all appearance a good defense. A frivolous answer is one that shows no defense, conceding all it alleges to be true.—*Brown* vs. *Jenison*, 1 Code R. N. S., 156.

A sham answer is upon its face good, but it sets up new matter which is false.

A frivolous answer controverts no material allegation in the complaint, and presents no tenable defence.—*Lefferts* vs. *Snediker*, 1 Abbott, 41.

Where neither complaint nor answer are verified, and the answer merely denies the allegations in the complaint, setting up no new matter, it cannot be stricken out as sham.—*Gœdel* vs. *Robinson*, 1 Abbott, 116.

A verified answer will not be stricken out as a sham, if there is any evidence that it was interposed on good faith.—*Mumm* vs. *Barnum*, 1 Abbott, 281.

51. Every pleading shall be subscribed by the party or his attorney, and when the complaint is verified by affidavit, the answer shall be verified also, except as provided in the next section.

52. The verification of the answer required in the last section may be omitted when an admission of the truth of the complaint might subject the party to prosecution for felony.

A denial in an answer, of knowledge or information sufficient to form a belief, as to matters stated in a complaint, is not necessarily sham or evasive, unless it appears that the party had the means of obtaining information directly within his reach.—*Wesson* vs. *Judd*, 1 Abbott, 254.

53. When an action is brought upon a written instrument, and the complaint contained a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified.

A party is not required to deny an endorsement under oath.—*Youngs* vs. *Bell*, 4 Cal., 201.

In an action on a promissory note by a special endorsee against the maker, the plaintiff must prove at the trial the genuineness of the endorsements, although the defendant has not denied their genuineness under oath.—*Grogan & Lent* vs. *Ruckle*, 1 Cal., 158.

54. When the defense to an action is founded upon a written instrument and a copy thereof is contained in the answer, or a copy is annexed thereto, the genuiness and due execution of such instrument shall be deemed admitted, unless the plaintiff file with the clerk five days previous to the commencement of the term at which the action is to be tried, an affidavit denying the same.

55. In all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true. And where a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the County where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except the party, he shall set forth in the affidavit the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; or when the State, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts, except that in actions prosecuted by the attorney general in behalf of the State the pleadings need not, in any case, be verified.

An attorney may verify in two cases, when the action is founded on a written instrument in his possession, and when all the material allegations of the pleading are within his personal knowledge.—*Mason* vs. *Brown*, 6 Pr. R., 484; *Treadwell* vs. *Fassett*, 10 Pr. R., 184.

When the verification is by the attorney he must set forth his knowledge or the ground of his belief on the subject, and the reason why it was not made by the party.—*Stannard* vs. *Mattice*, 7 Pr. R., 4; *Fitch* vs. *Bigelow*, 5 ib., 237.

The objection to the want of verification to the declaration should have been made either before answer or with the answer. It comes too late after answer.—*Greenfield* vs. *Steamer* "*Gunnell*," 6 Cal., Jan'y T.

56. It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The Court, or a Judge thereof, or a County judge, may order a further account, when the one delivered is too general, or is defective in any particular.

The party who is not satisfied with the bill should return it and move for another. It is too late to object at the trial.—*Dennison* vs. *Smith*, 1 Cal., 487.

This account may be enforced by motion at any time before trial.—*Yates* vs. *Bigelow*, 9 Pr. R., 186.

57. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out by the court on motion of any person aggrieved thereby.

On a motion to strike out, the papers should point out the precise parts at which the objections are aimed.—*Benedict* vs. *Dake*, 6 Pr. R., 352.

This motion is not a substitute for demurrer.—*Harlow* vs. *Hamilton*, 6 Pr. R., 475; *Bement* vs. *Wisner*, 1 Code Rep. N. S., 143.

58. In an action for the recovery of real property, such property shall be described, with its metes and bounds, in the complaint.

Describing lots as situated on a street, between other *well known* lots is sufficient.—*Bee* vs. *Rollinson*, 12th Dist. Court.

59. In pleading a judgment or other determination of a court or officer of especial jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

It is a good defense to an action upon a judgment, whether brought by the original judgment creditor or his assignee, that the judgment was fraudulently obtained.—*Dobson* vs. *Pearce*, 1 Abbott, 97.

60. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally, that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading, shall establish, on the trial, the facts showing such performance.

Where a person by his contract engages to do an act, performance is not excused by an inevitable accident.

Under an averment of performance of a covenant, evidence in excuse for non-performance is inadmissible.

A condition precedent must be strictly performed, to entitle a party to recover.—*Oakly* vs. *Morton*, 1 Kern, 25.

61. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage, and the Court shall thereupon take judicial notice thereof.

62. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall establish on the trial that it was so published or spoken.

The complaint in an action for libel, consisting in words not on their face libelous, must distinctly aver the extrinsic fact on which plaintiff relies to show the alleged li-

belous character of the words complained of, and it is not sufficient that this fact is alleged by way of inuendo.—*Caldwell* vs. *Raymond*, 2 Abbott, 193.

The defendant, in an action for slander or libel, may prove in mitigation of damages, facts and circumstances which disprove malice, although they tend to establish the truth of the defamatory charge. It is not necessary that the answer should allege the truth of the charge complained of, to entitle the defendant to aver and prove such facts and circumstances to reduce the amount of damages.

Accordingly, where in an action for charging the plaintiff with keeping a house of ill-fame, the answer denied the complaint, and as a partial defense alleged lewd and lascivious conduct by the plaintiff's family, not amounting to a justification of the charge; Held, that the evidence of such conduct was competent to reduce the amount of damages.—*Bush* vs. *Prosser*, 1 Kern, 347.

In an action for libel, where the answer contained, 1st, a denial of the publication, and, 2d, matter in justification and excuse, and the plaintiff demurred to the answer for insufficiency, specifying as grounds of demurrer objections only to the matter of justification and excuse, and judgment was given for the plaintiff on the demurrer; held, that the demurrer had reference only to the portion of the answer objected to, and that by the judgment the denial of the publication was not struck out of the answer.—*Matthews* vs. *Beach*, 4 Seld., 173.

63. In the actions mentioned in the last Section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

Brush vs. *Prosser*. 1 Kernan, 347, Supra.

64¶. The plaintiff may unite several causes of action in the same complaint, when they all arise out of

1st. Contracts, express or implied, or,

2d. Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same, or,

3d. Claims to recover specific personal property, with or without damages, for the withholding thereof, or,

4th. Claims against a Trustee by virtue of a contract, or by operation of law, or,

5th. Injuries to character, or,

6th. Injuries to person, or,

7th. Injuries to property. But the causes of action so united shall all belong to only one of these classes, and shall affect all the parties to the action, and not require different places of trial, and shall be separately stated.

Provided, however, that an action for malicious arrest and prosecution, or either of them, may be united with an action for either injury to character, or to the person.

Distinct accounts between the same parties may be sued upon separately.—*Secor* vs. *Sturgis*, 2 Abbott, 69

If several causes of action are improperly joined, the objection must be taken either by demurrer or answer, or the objection will be deemed to have been waived.—*Macondray* vs. *Simmons*, 1 Cal. 393.

Value of property destroyed, and damages for the same may be joined.—*Tendesen* vs. *Marshall*, 3 Cal. 440.

Plaintiff may sue for real property, damages for withholding it, rents and profits, in the same action.—*Sullivan* vs. *Davis*, 4 Cal. 291.

Indebutatus assumpsit for rent will not be in favor of a stranger for the purpose of trying his title; or by one of two litigant parties claiming the land. This action depending not upon the validity of plaintiff's title, but upon a contract expressed or implied—*Sampson* vs. *Shaeffer*, 3 Cal. 196.

The right to recover for use and occupation, is founded on contract alone.—*O'Conner* vs. *Corbett*, 3 Cal. 370.

A plaintiff has a right to waive a tort as against factors, and to bring his action to compel them to account, and for the net proceeds arising from the sales.—*Lubert* vs. *Chauviteau*, 3 Cal. 458.

Damages for a personal tort cannot be united with a demand properly cognizable in a court of equity.—*Mayo* vs. *Hadden*, 4 Cal 27.

A cause of action for malicious prosecution may be joined with a cause of action for slander.—*Watson* vs. *Haggan*, 3 Code Rep. 218.

Several causes of action arising on several judgments, may be joined in one action. *Bank of N. America* vs. *Suydam*, 1 Code Rep. N. S. 325.

The junction of account sales with promissory notes is proper.—*Vellman* vs. *King*, J. Rossevelt, unreported.

65‡. Every material allegation of the complaint, when it is verified, not specifically controverted by the answer, shall for the purpose of the action, be taken as true. The allegation of new matter in the answer, shall, on trial be deemed controverted by the adverse party, as upon a a direct denial or avoidance, as the case may require.

66. A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

Mayor of Albany vs. *Cunliff*, 2 Coms. 171.

67‡. After demurrer, and before the trial of issue on demurrer, either party may, within ten days, amend any pleading demurred to, of course, and without costs, filing the same as amended, and serving a copy thereof upon the adverse party or his attorney, who shall have ten days to answer or demur thereto, if the pleading be a complaint, or to demur thereto if it be an answer; but a party shall not so amend more than once. When a demurrer to a complaint is over-ruled and there is no answer filed, the court may, upon such terms as shall be just, and upon payment of costs, allow the defendant to file an answer. If a demurrer to the answer be over-ruled, the facts alleged in the answer shall still be considered as denied.

†. The court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may upon like terms, enlarge the time for an answer or demurrer, or demurrer to an answer filed. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may upon like terms allow an answer to be made after the time limited by this Act; and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives, from a judgment order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; when from any cause the summons and a copy of the complaint in an action have not been personally served on the defendant, the court may allow on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

The discovery of a fraud after suit brought, would entitle plaintiff so to shape his action as to include it.—*Truebody* vs. *Jacobson*, 2 Cal. 269.

The court may on trial amend by adding or striking out parties.—*Acquital* vs. *Crowell*, 1 Cal. 191.

Great latitude is given to the courts by our statutes in amending and altering pleadings.—*Stearns* vs. *Martin*, 4 Cal. 227; *Polock* vs. *Hunt*, 2 Cal. 193; *Cook* vs. *Spears*, ib. 409.

An amendment should be allowed or directed to conform the pleadings to the facts which ought to be in issue, in order to enable the court to decree fully on the merits.—*Conally* vs. *Peck*, 3 Cal. 75.

A refusal to allow an amendment is presumed to be right, unless the character of the proposed amendment is shown in the records.—*Jessup* vs. *King*, 4 Cal. 331.

An action in assumpsit cannot be changed in an action for tort by amendment of complaint.—*Ramirez* vs. *Murray*, 5 Cal., 60.

69. When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly.

Morgan vs. *Thrift*, 2 Cal. 262.

The name of the defendant cannot be changed after judgment, without notice.—*NcNally* vs. *Nott*, 3 Cal. 235.

70. In the construction of a pleading for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties.

71. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the sub-

stantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

The error in an answer entitled in the "Supreme" instead of the "Superior," court, may be disregarded.— *Williams* vs. *Sholto*, 4 Sand. 641.

TITLE V.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

CHAPTER I.

ARREST AND BAIL.

72. No person shall be arrested in a civil action, except as prescribed by this Act.

73. The defendant may be arrested as hereinafter prescribed, in the following cases arising after the passage of this Act:

1st. In an action for the recovery of money or damages on a cause of action arising upon contract express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors, or when the action is for wilful injury to person, to character, or to property, knowing the property to belong to another.

2d. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment; or for a wilful violation of duty.

3d. In an action to recover the possession of personal property, unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff.

4th. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation, for which the action is brought; or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

5th. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

One partner cannot arrest another, sueing to recover money.—*Cary* vs. *Williams*, 1 Duer, 667 ; *Soule* vs. *Hayward*, 1 Cal. 345.

A party will be discharged from arrest where the process, though proper in form has been issued in an improper case.—*Soule* vs. *Hayward*, 1 Cal. 345.

The representations, if false or fraudulent, must precede the contract.—*Snow* vs. *Halstead*, 1 Cal. 359.

In a suit to recover money received by a person as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal, and a refusal on his part to pay. An arrest in such case is prohibited by Section 15, Art. I., of the Constitution.—*Matter of Holdforth* on *Habeas Corpus*, 1 Cal., 438.

The judgment should find the facts of the fraud upon which the defendant can only be imprisoned or his bail become forfeit.—*Matoon* vs. *Eder*, 6 Cal., Jan'y T.

74. An order for the arrest of the defendant shall be obtained from a judge of the court in which the action is brought, or from a county judge.

75. The order may be made whenever it shall appear to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists; and the case is one of those mentioned in Section seventy-three. The affidavit shall be either positive, or upon information and belief; and when upon information and belief, it shall state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit shall be filed with the clerk of the county.

If plaintiff's affidavit set forth sufficient cause, though defendant may file counter affidavits, he must be held.—*Southworth* vs. *Resing*, 3 Cal., 377 ; *Rutherford* vs. *Baine*, Superior Court.

The affidavit must contain sufficient facts, and must not refer to the complaint for the matter, without setting forth sufficient of itself.—*McGilvery* vs. *Morehead*, 2 Cal., 607.

Putting in and perfecting bail is a waiver of all defects in the affidavit.—*Stewart* vs. *Howard*, 15 Barb, 26.

76. Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars. Each of the sureties shall annex to the undertaking an affidavit that he is a resident and householder, or free holder, within the State, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking shall be filed with clerk of the court.

77. The order may be made to accompany the summons, or any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to

bail in a specified sum, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending.

78. The order of arrest, with a copy of the affidavit upon which it is made, shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him the copy of the affidavit; and also, if desired, a copy of the order of arrest.

79. The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law.

80. The defendant, at any time before execution, shall be discharged from the arrest either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

81. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that they are bound in the amount mentioned in the order of arrest; that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

The sheriff is bound to take bail provided they are sufficient. If he refuses, he is liable.—*Richards* vs. *Porter*, 7 John, 137; *Dash* vs. *Van Kleeck*, ib., 477.

82. At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration: or he may surrender himself to the sheriff of the county where he was arrested.

83. For the purpose of surrendering the defendant, the bail at any time or place before they are finally charged, may themselves arrest him; or by a written authority, endorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of the defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail shall be exonerated: *Provided*, such arrest, delivery or surrender, take place before the expiration of ten days after judgment, but if such arrest, delivery or surrender be not made within ten days after judgment, the bail shall be finally charged on their undertaking, and be bound to pay the amount of the judgment within ten days thereafter.

The authority to arrest need not be signed by all the bail. The authority of some is good.—Re *Taylor*, 7 Pr. R., 214.

84‡. If the bail neglect or refuse to pay the judgment within ten days

after they are finally charged, an action may be commenced against such bail for the amount of such original judgment.

Bail are estopped from controverting the right of plaintiff to arrest.—*Gregory* vs. *Levy*, 12 Barb., 610; 7 Pr. R., 37.

Secs. 83 and 84 fully discussed in *Matoon* vs. *Eder*, 6 Cal., Jan'y T.

85. The bail shall also be exonerated by the death of the defendant, or his imprisonment in a State Prison; or by his legal discharge from the obligation to render himself amenable to the process.

86. Within the time limited for that purpose, the sheriff shall file the order of arrest in the office of the clerk of the court in which the action is pending, with his return endorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he shall retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them, and the sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking shall be filed with the clerk of the court.

87. Within five days after the receipt of the notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail, (specifying the places of residence and occupations of the latter,) before a Judge of the Court or County Judge, or County Clerk, at a specified time and place; the time to be not less than five, nor more than ten days thereafter, except by consent of parties. In case other bail be given there shall be a new undertaking.

88. The qualifications of bail shall be as follows:

1st. Each of them shall be a resident, and householder, or freeholder, within the county.

2d. Each shall be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the Judge, or County Clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

89. For the purpose of justification, each of the bail shall attend before the Judge or County Clerk at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching

his sufficiency, in such manner as the Judge or County Clerk in his discretion, may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

90. If the Judge or Clerk find the bail sufficient he shall annex the examination to the undertaking, endorse his allowance thereon and cause them to be filed, and the sheriff shall thereupon be exonerated from liability.

91. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged out of custody.

92. The sheriff shall immediately after the deposit pay the same into court, and take from the clerk receiving the same, two certificates of such payment; the one of which he shall deliver or transmit to the plaintiff, or his attorney, and the other to the defendant. For any default in making such payment the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

93. If money be deposited, as provided in the last two sections, bail may be given, and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

94. Where money shall have been deposited, if it remain on deposit at the time of a recovery of a judgment in favor of the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof; and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall, under like direction of the court, refund to him the whole sum deposited and remaining unapplied.

95. If, after being arrested, the defendant escape or be rescued, the sheriff shall himself be liable as bail; but he may discharge himself from such liability, by the giving and justification of bail, at any time before judgment.

Where the bail given for the defendant upon his arrest are excepted to and do not justify, and no other bail are given, nor a deposit made, the sheriff becomes liable as bail.—*Buckman* vs. *Carnley*, 9 Pr. R., 180.

The sheriff may as bail re-arrest the defendant without process.—*Sartos* vs. *Marugues*, 9 Pr. R., 188.

96. If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied in whole or in part, the same proceedings may be had on his official bond, for the recovery of the whole or any deficiency, as in other cases of delinquency.

97. A defendant arrested may at any time before the justification of bail apply to the Judge who made the order, or the Court in which the action is pending, upon reasonable notice to the plaintiff to vacate the order of arrest, or to reduce the amount of bail. If the application be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

A motion to vacate an order of arrest must be made before the bail have justified if excepted to, or before the time to except expires.—*Lewis* vs. *Truesdell*, 1 Code R. N. S., 106; *Barker* vs. *Dillon*, ib. 206.

A party discharged for defect of proof may be re-arrested upon perfecting the same. —*Tucker* vs. *Chapman*, Superior Court.

A person once arrested and discharged cannot be re-arrested in the same action.—*McGilvery* vs. *Morehead*, 2 Cal., 607.

98. If upon such application it shall satisfactorily appear that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appear that the bail was fixed too high, the amount shall be reduced.

CHAPTER II.

CLAIMS FOR DELIVERY OF PERSONAL PROPERTY.

99. The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

This provisional remedy cannot be maintained against a party who has not in fact or in law the possession or control of the property claimed.—*Roberts* vs. *Randal*, 3 Sand., 707; *Brockway* vs. *Burnap*, 12 Barb., 347.

100. Where a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1st. That the plaintiff is the owner of the property claimed (particularly describing it,) or is lawfully entitled to the possession thereof:

2d. That the property is wrongfully detained by the defendant:

3d. The alleged cause of the detention thereof, according to his best knowledge, information and belief:

4th. That the same has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution, or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure; and,

5th. The actual value of the property.

A general appearance by defendants is a waiver of any irregularity in the affidavits on which the requisition is founded.—*Hyde* vs. *Patterson*, 1 Abbott, 248.

101‡. The plaintiff or his attorney may thereupon by an endorsement in writing upon the affidavit, require the Sheriff of the County where the property claimed may be, to take the same from the defendant.

The sheriff will, however, be liable to the owner who has his legal remedy against any one for the taking, unless it be by virtue of legal process against him.—*Rhodes* vs. *Patterson*, 3 Cal., 469.

102‡. Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the Sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the Sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or if neither can be found of either, by leaving them at the usual place of abode, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the nearest post office, directed to the defendant.

In an action on the bond, the fact that defendant brought his action before an incompetent tribunal is no defense, and the plea that the title of property so replevied is in him, is bad.—*McDermott* vs. *Isbell*, 4 Cal., 113.

The sheriff must endorse his approval on the undertaking.—*Burns* vs. *Robbins*, 1 Code Rep., 62.

A bond may be filed nunc pro tunc when the one given in the first instance is defective.—*Newland* vs. *Willits*, 1 Barb., 20; *Manley* vs. *Patterson*, 3 Code Rep., 89.

Where a replevin bond substantially conforms to the act, and no variation is pointed out, the assignees of the defendants can maintain an action upon it.—*Wingate* vs. *Brooks*, 3 Cal., 112.

103. The defendant may, within two days after the service of a copy

of the affidavit and the undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest; and the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

104. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and serving of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section one hundred and nine.

This bond is assignable to the sheriff.—*Wingate* vs. *Brooks*, 3 Cal., 112.

105. The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, shall justify before a Judge or County Clerk, in the same manner as upon bail on arrest; and upon such justification, the Sheriff shall deliver the property to the defendant. The Sheriff shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

106. The qualification of sureties and their justification shall be such as are prescribed by this Act, in respect to bail upon an order of arrest.

107. If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county.

108. When the sheriff shall have taken property, as in this chapter

provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

109. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to possession thereof, stating the grounds of such title or right, and serve the same upon the Sheriff, the Sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the Sheriff against such claim, by an undertaking, by two different sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the County; and no claim to such property by any other person than the defendant or his agent, shall be valid against the Sheriff, unless so made.

110‡. The Sheriff shall file the notice, undertaking and affidavit, with his proceedings thereon, with the Clerk of the Court in which the action is pending, within twenty days after taking the property mentioned therein.

CHAPTER III.

INJUNCTION.

111. An injunction is a writ or order, requiring a person to refrain from a particular act. The order or writ may be granted by the court in which action is brought, or by a Judge thereof, or by a County Judge; and when made by a Judge may be enforced as the order of the court.

Abuse in injunctions should be granted against.—*Dewitt* vs. *Hays*, 2 Cal., 463.

An injunction operates to restrain not only the party enjoined but other courts on the ground of judicial comity.—*Engels* vs. *Lubeck*, 4 Cal., 31. Contra: *Grant* vs. *Quick*, 5 Sand., 612.

An injunction is a mere remedial process and where the party obtaining it has also obtained a judgment upon his cause, the court will not revise the propriety of granting the writ.—*Hicks* vs. *Davis*, 4 Cal., 67.

112. An injunction may be granted in the following cases:

1st. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2d. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce great or irreparable injury to the plaintiff.

3d. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action and tending to render the judgment ineffectual.

The allegation, irreparable injury, is insufficient.—*Dewitt* vs. *Hays*, 2 Cal., 463.

The writ of injunction can only be issued where the case is one of equity jurisdiction. —*Minturn* vs. *Hays*, 2 Cal., 590.

A perpetual injunction to restrain defendants from raising their dam higher than the point designated was allowed.—*Ramsay* vs. *Chandler*, 3 Cal., 90.

The nuisance complained of must cause irremediable mischief, or such an injury as cannot be compensated by damages.—*Gregory* vs. *Hay*, 3 Cal., 332; *Middleton* vs. *Franklin*, ib., 238; *Waldron* vs. *Marsh*, 5 Cal., 9.

An injunction will sometimes be allowed to present a multiplicity of suits.—*Woodruff* vs. *Fisher*, 17 Barb., 224.

An injunction under the second division can only be for acts done or threatened, pending the litigation.—*Sebring* vs. *Lant*, 9 Pr. R., 347; *Malcolm* vs. *Miller*, 6 ib., 456.

The effect of the temporary injunction under the third division is not to restrain any remover or disposition whatever of defendant's property, but only such as would defraud the creditors.—*Brewster* vs. *Hodges*, 1 Duer, 609.

An injunction to restrain the collection of a tax illegally laid upon personal estate, will not be granted.—*Wilson* vs. *Mayor of New York*, 1 Abbott, 4; *Chemical Bank* vs. *Same*, ib., 79; *New York Life Insurance Co.* vs. *Same*, ib., 250.

An injunction may be granted to restrain proceedings on judgment, and in many cases this course is preferable to granting an order in the suit sought to be stayed.—*Watt* vs. *Rogers*, 2 Abbott, 261.

The courts of this State have no power to restrain by injunction the acts of officers of the State who are proceeding under authority of a law of the State. That such law is unconstitutional forms no ground for granting such injunction.—*Thompson* vs. *Commissioners of the Canal Fund.*, 2 Abbott, 248.

113. The injunction may be granted at the time of issuing the summons upon the complaint; and at any time afterwards, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, shall show satisfactorily that sufficient grounds exist therefor. No injunction shall be granted on the complaint, unless it be verified by the oath of the plaintiff, or some one in his behalf, that he the person making the oath has read the complaint, or heard the complaint read, and knows the contents thereof, and the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true. When granted on the complaint, a copy of the complaint and verification attached shall be served with the injunction: when granted upon affidavit, a copy of the affidavit shall be served with the injunction.

See notes to Section 55.

The order of injunction must be served by copy. Verbal notice is insufficient, unless the party be in court and hear the order pronounced.—*Elliot* vs. *Osborne*, 1 Cal., 396.

114. An injunction shall not be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the Court or Judge granting or refusing the injunction.

115. On granting an injunction, the Court or Judge shall require, except where the people of the State are a party plaintiff, a written undertaking, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the Court finally decide that the plaintiff was not entitled thereto.

An injunction order is inoperative unless the undertaking be given.—*Elliott* vs. *Osborne*, 1 Cal., 396.

For suits on undertakings, see *Morgan* vs. *Thrift*, 2 Cal., 562; *Cunningham* vs. *Breed*, 4 Cal., 384; *Gelston* vs. *Whitesides*, 3 Cal., 309.

In suit on undertaking, counsel fees in having injunction dissolved, allowed.—*Ah Thaie* vs. *Quan Wan*, 3 Cal., 216; *Coates* vs. *Coates*, 1 Duer, 664.

The court may order a reference to ascertain the damages sustained by an injunction issued without cause.—*Russell* vs. *Elliot*, 2 Cal., 245; *Sullivan* vs. *Judah*, 4 Paige, 444.

A party filing an undertaking to obtain an injunction, is deemed to have waived the right to insist on a trial by jury; and consented that the damages may be ascertained in the mode prescribed by the Statute; and an order of reference is no violation of the constitutional right to trial by jury.—*Russell* vs. *Elliott*, 2 Cal., 245.

116. If the Court or Judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained.

117. An injunction to suspend the general and ordinary business of a corporation, shall not be granted except by the court; nor shall it be granted without due notice of the application therefor to the proper officers of the corporation, except when the people of this State are a party to the proceeding.

118. If an injunction be granted without notice, the defendant, at any time before the trial, may apply upon reasonable notice to the Judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the

complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence in addition to those on which the injunction was granted.

A motion to vacate an injunction once denied, cannot be renewed unless leave be reserved or some new ground in vacating arise.—*Hoffman* vs. *Livingston*, 1 John Ch. R., 211.

119. If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it shall be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it shall be modified.

CHAPTER IV.

ATTACHMENT.

120†. The plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as hereinafter provided in the following cases:

1st. In an action upon a contract express or implied, for the direct payment of money, which contract is made or is payable in this State, and is not secured by a mortgage upon real or personal property.

2d. In an action upon a contract, express or implied, against a defendant not residing in this State.

Attachment only given in cases of indebtedness arising out of contract.—*Griswold* vs. *Sharp*, 2 Cal., 17.

The contract must be made in this State, or must contain a stipulation that the money is to be paid here, to authorize an attachment.—*Dulton* vs. *Shelton*, 3 Cal., 206.

Where the defendant left New York State and went to Wisconsin to establish business, but intended, even if successful, to leave it in charge of a clerk and return; held, he was not a non-resident.—*Hurlbut* vs. *Seeley*, 2 Abbott, 138.

Where a party has been attached as a non-resident, he may move to discharge the attachment on the ground of his being a resident, and the Court will grant a reference to ascertain the fact without an undertaking from defendant.—*Killian* vs. *Washington*, 2 Code Rep., 78.

121†. The Clerk of the Court shall issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, which shall be filed, showing—

1st. That the defendant is indebted to the plaintiff, (specifying the

amount of such indebtedness, over and above all legal set-offs or counter claims,) upon a contract express or implied, for the direct payment of money, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage on real or personal property; or,

2d. That the defendant is indebted to the plaintiff, (specifying the amount of such indebtedness as near as may be, over and above all legal set-offs or counter claims,) and that the defendant is a non-resident of the State.

The affidavit must state whether the contract is express or is implied, and not state it in the alternative.—*Hawley* vs. *Delmas*, 4 Cal., 195.

122. Before issuing the writ the clerk shall require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, not exceeding the amount claimed by the plaintiff, with sufficient sureties to the effect, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

For suit on attachment bond see *Heath* vs. *Lent*, 1 Cal., 410; *Benedict* vs. *Bray*, 2 Cal., 251, and *Ah Thaie* vs. *Quan Wan*, 3 Cal., 216, overruling part of *Heath* vs. *Lent*.

The undertaking must precede the writ and accompany the affidavit.—*Benedict* vs. *Bray*, 2 Cal., 251.

An attachment issued without an undertaking of a plaintiff and a surety would be irregular and perhaps void.—*Bennett* vs. *Brown*, 1 Code Rep., N. S., 267.

123. The writ shall be directed to the Sheriff of any county in which property of such defendant may be, and require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking, of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs; in which case to take such undertaking. Several writs may be issued at the same time, to the Sheriffs of different counties.

The sureties are estopped from controverting that the defendant was not a non-resident.—*Haggart* vs. *Morgan*, 1 Seld, 422.

124. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, and all debts due such defendant, and all other property in this State of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

125. The Sheriff to whom the writ is directed and delivered shall ex-

ecute the same without delay, and if the undertaking mentioned in Section 123 be not given, as follows:

1st. Real property shall be attached by leaving a copy of the writ with the occupant thereof; or if there be no occupant, by posting a copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the Recorder of the county.

2d. Personal property, capable of manual delivery shall be attached by taking it into custody.

3d. Stock or shares, or interest in stock or shares, of any corporation or company, shall be attached by leaving with the President, or other head of the same, or the Secretary, Cashier or Managing Agent thereof, a copy of the writ, and a notice stating the stock or interest of the defendant is attached in pursuance of such writ.

4th. Debts and credits and other personal property, not capable of manual delivery, shall be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits, or other personal property, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.

Money of the city, appropriated for a particular purpose, cannot be attached for any other debt.—*Carter* vs. *City of San Francisco*, 4th Dist. Court, July 1, 1855.

3d. Bonds made by a railroad company, and placed in the hands of their agents to be sold, are not, either in the hands of the company or of the agents, the property of the company, in such sense that an attachment issued against the company can be levied upon them.—*Coddington* vs. *Gilbert*, 2 Abbot, 242.

The writ first delivered to the Sheriff has priority whether or not the writs are served by the same deputies or at the same time.—*Edwards* vs. *Hermann*, Superior Court.

An attachment upon property creates a lien thereupon and cannot in Insolvency be delivered to the assignee.—*Pickett* vs. *His Creditors*, 4th Dist. Court.

126. Upon receiving information in writing from the plaintiff, or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff shall serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ.

127. All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property is delivered up or transferred, or such debts be paid to the

Sheriff, liable to the plaintiff, for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

128¶. Any person owing debts to the defendant, or having in his possession or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the Court or Judge, or a Referee appointed by the Court or Judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The Court or Judge may, after such examination, order personal property capable of manual delivery to be delivered to the Sheriff on such terms as may be just, having reference to any liens thereon, or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

Where a garnishee answers under oath that he was released by the plaintiff, who abandoned the examination, he should be discharged unless such answer under oath be denied by plaintiff. Where a party is garnisheed to answer on a certain day, and appears, and the summoning party declines or is not prepared to take his answer, and a term elapses, the party is discharged from liability to answer.—*Ogden* vs. *Mills*, 3 Cal., 253.

A garnishee can only be required to answer as to his liability to defendant at the time of the service of garnishment.—*Johnson* vs. *Carry*, 2 Cal., 33; *Norris* vs. *Burgoyne*, 4 Cal., 409.

Unless the answer of the garnishee discloses liens having priority of claim upon the fund in his hands an order for a bill of interpleader will not be granted.—*Cahoon* vs. *Levy*, 4 Cal., 243.

To subserve the purpose of justice, Courts should allow a garnishee to amend his answer whenever it appears that he has committed a mistake or fallen into an error which could not reasonably have been avoided, but not otherwise.—*Smith* vs. *Hutchinson*, 5 Cal., 10.

129. The Sheriff shall make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he shall request, at the time of service, the party owing the debt, or having the credit, to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he shall return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and descriptions of such debt or credit.

130. If any of the property attached be perishable, the Sheriff shall sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous

to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The Sheriff's receipt shall be a sufficient discharge for the amount paid.

See Sec. 654.

131. If any personal property attached be claimed by a third person as his property, the Sheriff may summon a jury of six men to try the validity of such claim ; and such proceedings shall be had thereon, with the like effect, as in a case of a claim after levy upon execution.

132. If judgment be recovered by the plaintiff, the Sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose :

1st. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment :

2d. If any balance remain due, and an execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notice of the sales shall be given, and the sales conducted as in other cases of sales on execution.

Where an attachment was issued by the Court against property of the debtor, and the Sheriff had executed the same and was ordered to make the amount due the creditor out of the goods, chattels and property of the debtor, the Sheriff could not maintain an action in his own name to recover a sum owing to the attachment debtor by a third person for goods sold and delivered.—*Sublette* vs. *Melhado*, 1 Cal., 104.

133. If after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting the fees, to the payment of the judgment, any balance shall remain due, the Sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the Sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

134. If the execution be returned unsatified in whole or in part, the plaintiff may prosecute any undertaking given pursuant to Section one hundred and twenty-three or Section one hundred and thirty-seven, or he may proceed as in other cases upon the return of an execution.

135. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the Sheriff and all the property attached remaining in the Sheriff's hands, shall be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom.

136‡. Whenever the defendant shall have appeared in the action, he may apply, upon reasonable notice to the plaintiff, to the Court in which the action is pending, or to the Judge thereof, or to a County Judge, for an order to discharge the same, upon the execution of the undertaking mentioned in ths next Section; and if the application be granted, all the proceeds of sales and monies collected by the Sheriff, and all the property attached remaining in his hands, shall be released from the attachment, and delivered to the defendant upon the justification of the sureties on the undertaking, if required by the plaintiff.

137‡. Upon such application the defendant shall deliver to the Court or Judge an undertaking executed by at least two sureties, residents and freeholders or householders in the county, to the effect that the sureties will, on demand, pay to the plaintiff the amount of any judgment that may be recovered in favor of the plaintiff in the action, not exceeding the sum specified in the undertaking, which shall be sufficient to satisfy the amount claimed by the plaintiff in his complaint, and the costs. The sureties may be required to justify, on such application before the Judge or Court, and the property attached shall not be released from the attachment without their justification, if the same be required.

138‡. The defendant may also, any time before the time of answering expires, apply on motion, upon reasonable notice to the plaintiff, to the Court in which the action is brought, or to the Judge thereof, or to a County Judge, that the attachment be discharged on the ground that the writ was improperly issued.

An order improperly dissolving an attachment will be reversed.—*Reiss* vs. *Brady*, 2 Cal., 132.

An order improperly refusing an attachment will be reversed, even after final judgment.—*Griswold* vs. *Sharp*, 2 Cal., 17.

139. If the motion be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiffs may oppose the same by affidavits or other evidence, in addition to those on which the order of attachment was made.

140. If upon such application it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.

141. The Sheriff shall return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceeding endorsed thereon, or attached thereto. The provisions of this chapter shall not apply to any suits already commenced, but so far as such suits may be concerned, the Act entitled "An Act to regulate proceedings against debtors by attachment," passed April 22d, 1850, shall be deemed in full force and effect.

This return cannot be amended where a third party has acquired an interest adverse to the attachment.—*Newhall* vs. *Provost*, 6 Cal., Jan'y T.

The Sheriff's return is conclusive against the plaintiff, and his action must be for a false return.—*Egery* vs. *Buchanan*, 5 Cal., 22.

CHAPTER V.

DEPOSIT IN COURT.

142. When it is admitted, by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing, capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs, or is due, to another party, the Court may order the same, upon motion, to be deposited in Court, or delivered to such party, upon such conditions as may be just, subject to the further direction of the Court.

An order directing the defendant to pay the amount admitted due by the answer is an appealable order.—*Merritt* vs. *Thompson*, 1 Abbott, 223.

143‡. A receiver may be appointed by the Court in which the action is pending, or by a Judge thereof:

1st. Before judgment, provisionally, on the application of either party when he establishes a *prima facie* right to the property, or to an interest in the property which is the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired:

2d. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, and

3d. In such other cases as are in accordance with the practice of Courts of Equity jurisdiction.

A special receiver appointed in a cause to take charge of the fund in dispute is an officer of the Court and entitled to the instructions of the Court as to his duty under an order in the cause respecting payment out of each fund.—*Curtis* vs. *Leavitt*, 1 Abbott, 274.

An order to show cause why a receiver should be appointed before the action is commenced, is irregular.—*Kattenstroth* vs. *The Astor Bank*, 2 Duer, 632.

Upon a motion for the receiver, the merits are not enquired into. It relates only to the preservation of the property in controversy.—*Chapman* vs. *Hammersly*, 4 Wend., 173.

A receiver should apply for an order for leave to sue for a debt.—*Meritt* vs. *Lyon*, 16 Wend., 410.

TITLE VI.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.

JUDGMENT IN GENERAL.

144. A judgment is the final determination of the rights of the parties in the action or proceeding, and may be entered in term or vacation.

Upon the adjournment of Term, the Court cannot disturb its judgment except in cases provided by statute.—*Swydam* vs. *Pitcher*, 4 Cal. 280; *Morrison* vs. *Dopman*, 3 Cal. 255; *Baldwin* vs. *Kramer*, 2 Cal. 582; *Carpentier* vs. *Hark*, 5 Cal. 81; *Robb* vs. *Robb*, 6 Cal. Jan. T.

By a final judgment is to be understood, not a final determination of the rights of the parties in the subject matter of the litigation, but merely of the particular suit.—*Belt* vs. *Davis*, 1 Cal. 134,

A judgment rendered by a District Court, after the time appointed by law for its adjournment, is invalid, and will be reversed on appeal.—*Smith* vs. *Chichester*, 1 Cal., 409.

145. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Judgment rendered in favor of plaintiff against one defendant, and in favor of other defendant against plaintiff.—*Rowe* vs. *Chandler*, 1 Cal. 167; *Adams* vs. *Gorham*, 6 Cal. Jan. T.

A general judgment against all defendants, where only one was served with process, is error.—*Estell* vs. *Chenery*, 3 Cal. 467.

A judgment which is right will not be reversed because it is rendered upon a wrong reason.—*Helm* vs. *Dumars*, 3 Cal. 454.

It appearing upon the trial of an action brought against seven defendants, that five of them only were liable, the plaintiff moved to strike out the names of the other two. Motion granted, with the addition that he pay their costs; and judgment rendered in favor of the two for their costs, and against the five for debt and costs.

The allowance of costs to the two defendants severed, sustained on appeal. The proper form of judgment in such a case.—*Marks* vs. *Bard*, 1 Abbott, 63.

146. In an action against several defendants, the Court may, in its

discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

147. The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the Court may grant him any relief consistent with the case made by the complaint, and embraced within the issue.

148. An action may be dismissed, or a judgment of non-suit entered, in the following cases:

1st. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the Clerk to the defendant, who may have his action thereon.

2d. By either party, upon the written consent of the other.

3d. By the Court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4th. By the Court, when upon the trial, and before the final submission of the case, the plaintiff abandons it.

5th. By the Court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions shall be made by an entry in the Clerk's register. Judgment may thereupon be entered accordingly.

Where a bill disclosed that the same subject-matter had been litigated between the same parties in a prior suit, and that in the said suit, the plaintiff in this suit, had set up the same equity which he claims by this bill, the bill was ordered to be dismissed.—*Barnett* vs. *Kilbourne*, 3 Cal. 327.

Costs in way of indemnity, ought not to be taxed in case of non-suit.—*Rice* vs. *Leonard*, 5 Cal. 15.

Where the defendant moved for a non-suit, and afterward introduced evidence supplying the defect in the plaintiff's testimony on which the motion for non-suit was founded. Held, that the defendant had thereby waived his motion, and could not insist upon it in the appellate court.—*Ringgold* vs. *Haven*, 1 Cal. 108.

Plaintiff may be non-suited against his consent. Where there is no evidence to warrant a verdict, it is the duty of the Court to enter a non-suit.—*Ringgold* vs. *Haven*, 1 Cal. 108; *Dalrymple* vs. *Hansen*, ib. 125; *Mateer* vs. *Brown*, ib. 221; *Peralta* vs. *Mariea*, 3 Cal. 185.

Where a party moves for a non-suit upon a specific ground, he cannot, on appeal, assume a different position.—*Mateer* vs. *Brown*, 1 Cal. 221; *Ledley* vs. *Hayes*, ib. 160.

If no objection is made to the introduction of promissory notes in evidence, whose endorsements are not denied with sufficient certainty in the answer, a non-suit cannot be granted on that ground.—*Pinkham* vs. *McFarland*, 5 Cal. 23.

After a set-off is pleaded, plaintiff cannot discontinue as a matter of course.—*Cockle* vs. *Underwood*, 1 Abbott, 1.

149. In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

150. Judgment may be had, if the defendant fail to answer the complaint, as follows:

1st. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the Clerk of the Court within the time specified in the summons, or such further time as may have been granted, the Clerk, upon the application of the plaintiff, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants in the cases provided for in Section 32.

2d. In other actions, if no answer has been filed with the Clerk of the Court within the time specified in the summons, or such further time as may have been granted, the Clerk shall enter the default of the defendant; and thereafter the defendant may apply at the first or any subsequent term of the Court for the relief demanded in the complaint. If the taking of any account, or the proof of any fact, be necessary to enable the Court to give judgment, or to carry the judgment into effect, the Court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the Court may order the damages to be assessed by a jury: or, if to determine the amount of damages, the examination of a long account be necessary, by a reference as above provided.

3d. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time designated in the order of publication, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the Court shall thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the State, shall require the plaintiff or his agent to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover.

Judgment by default will be set aside for surprise.—*Bidleman* vs. *Kewen*, 2 Cal. 248.

If the summons be radically defective, it will not support a judgment by default.—*People* vs. *Woodlief*, 2 Cal. 241.

A final judgment by default can properly be rendered upon an unliquidated demand,

when the defendant has been notified in the summons of the amount for which the plaintiff will take judgment.—*Hartman* vs. *Williams*, 4 Cal. 254.

There may be error in a judgment by default, as well as in a judgment rendered upon issue, joined in the pleadings, and tried by a jury, and the error may be corrected on appeal.—*Stevens* vs. *Ross*, 1 Cal. 94.

CHAPTER III.

OF ISSUES, AND THE MANNER OF THEIR DISPOSITION.

151. An issue arises when a fact or conclusion of law is maintained by the one party, and is controverted by the other. Issues are of two kinds:

1st. Of law: and

2d. Of fact.

152‡. An issue of law arises upon a demurrer to the complaint, or answer as to some part thereof.

153‡. An issue of fact arises:

1st. Upon a material allegation in the complaint, controverted by the answer: and

2d. Upon new matter in the answer, except an issue of law is joined therein.

154. An issue of law shall be tried by the Court, unless it be referred, upon consent, as provided in Chapter VI. of this Title.

155. An issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this Act. Where there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of.

156. The Clerk shall enter cases upon the calendar of the Court, according to the date of the issue. Causes once placed on the calendar for a general or special term, if not tried or heard at such term, shall remain upon the calendar from Court to Court, until finally disposed of.

157. Either party may bring the issue to trial, or to a hearing, and in the absence of the adverse party, unless the Court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

158. A motion to postpone a trial on the ground of the absence of evidence, shall only be made upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The Court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed.

CHAPTER IV.

TRIAL BY JURY.

ARTICLE I.

FORMATION OF THE JURY.

159. When the action is called for trial by jury, the Clerk shall prepare separate ballots containing the names of the jurors summoned who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted before the jury is complete, or if from any cause a juror or jurors be excused or discharged, the Sheriff shall summon, under the direction of the Court, from the citizens of the county and not from bystanders, so many qualified persons as may be necessary to complete the jury. The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than three. Such consent shall be entered by the Clerk in the minutes of the trial.

A juror must be an elector in the county in which he is returned, and have resided in the county thirty days.—*Sampson* vs. *Schaffer*, 3 Cal., 107; *People* vs. *March*, 5 Cal., 59.

The right of trial by jury cannot be waived by implication, but may be, in the mode prescribed by law.—*Smith* vs. *Pollock*, 2 Cal., 92; *Russell* vs. *Elliot*, ib., 245.

160. As soon as the jury is completed, an oath or affirmation shall be administered to the jurors, in substance, that they each of them will well and truly try the matter at issue between ——— the plaintiff, and ——— the defendant, and a true verdict render according to the evidence.

161. Either party may challenge the jurors, but when there are several parties on either side they shall join in a challenge before it can be

made. The challenges shall be to individual jurors, and shall either be peremptory or for cause. Each party shall be entitled to four peremptory challenges.

162. Challenges for cause shall be taken on one or more of the following grounds:

1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror:

2d. Consanguinity or affinity within the third degree to either party:

3d. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party; or being member of the family of either party; or a partner in business with either party: or being security on any bond or obligation for either party:

4th. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action:

5th. Interest on the part of the juror in the event of the action, or in the main question involved in the action:

6th. Having formed or expressed an unqualified opinion, or belief as to the merits of the action:

7th. The existence of a state of mind in the juror evincing enmity against, or bias to, either party.

163. Challenges for cause shall be tried by the Court. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.

ARTICLE II.

CONDUCT OF THE TRIAL.

164. If, after the empanneling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or a new jury may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards empanneled.

The withdrawal of a juror and continuance of a case thereby, is no ground for reversing a judgment subsequently obtained.—*Benedict* vs. *Cozzens*, 4 Cal., 381.

165. In charging the jury the Court shall state to them all matters of law which it thinks necessary for their information in giving their verdict;

and if it state the testimony of the case it shall also inform the jury that they are the exclusive judges of all questions of fact. The Court shall furnish to either party at the time, upon request, a statement in writing of the points of law contained in the charge; or shall sign at the time, a statement of such points prepared and submitted by the counsel of either party.

The Court must give or refuse instructions. The sense must not be altered, although the phraseology may be modified.—*Fowler* vs. *Smith*, 2 Cal., 39; *Russell* vs. *Amador*, 3 Cal., 400; *Conrad* vs. *Lindley*, 2 Cal., 173; *Jamison* vs. *Gunary*, 5 Cal., 82.

A request to charge the jury should be in such form that the Court may charge in the terms of the request, without qualification.—*Carpenter* vs. *Stilwell*, 1 Kern, 61.

It seems improper to instruct the jury to take into consideration all the facts and do equal justice between all the parties — it may mislead them.—*Kelly* vs. *Cunningham*, 1 Cal., 366.

The whole charge of a District Judge should be taken together, and when considered in this way, if it appear that the jury have not been misled by it, a new trial will not be granted; although some of the instructions may in slight respects be repugnant to each other.—*Carrington* vs. *Pacific M. S. S. Co.*, 1 Cal., 475.

The charge of a Judge to a jury should be given with reference to the testimony adduced on the trial; and where the charge is returned on appeal, but no portion of the testimony, this Court will not undertake to determine as to the correctness or incorrectness of the charge.—*The People* vs. *McCauley*, 1 Cal., 379.

The Court should refuse to instruct the jury on abstract questions of law.—*Fowler* vs. *Smith*, 2 Cal., 39.

An erroneous instruction may be assigned for error, if there be any evidence rendering it pertinent to the issue.—*Buzzell* vs. *Bennett*, 2 Cal., 101.

It is error in the Court to refuse to instruct the jury in accordance with the provisions of the 135th Section of the Act to regulate settlements of the estates of deceased persons when requested so to do, and the evidence shows that it is proper and relevant. —*Benedict* vs. *Haggin*, Administrator, 2 Cal., 385.

Where the complaint does not charge the mortgagee in possession with negligence or improper conduct, in the leasing the mortgaged premises, but requires him to account for the rents he actually received, it is proper in the Court to refuse to instruct the jury that he might have leased the property differently, and to charge him with what he might have received, if so leased.—*Benham* vs. *Rowe*, 2 Cal., 387.

The question of notice of the dissolution of partnership, is a fact for the jury under the charge of the Court.—*Rabe* vs. *Wells & Co.*, 3 Cal., 148.

166. After hearing the charge, the jury may either decide in Court, or retire for deliberation. If they retire, they shall be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the Court. The officer shall, to the utmost of his ability, keep the jury together separate from other persons; he shall not suffer any communication to be made to them, or make any himself, unless by order of the Court, except to ask them if they have agreed upon their verdict; and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

167. Upon retiring for deliberation the jury may take with them all

papers (except depositions,) which have been received as evidence in the cause; or copies of such papers as ought not, in the opinion of the Court, to be taken from the person having them in possession; aud they may also take with them notes of the testimony, or other proceedings on the trial, taken by themselves, or any of them; but none taken by any other person.

168. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into Court. Upon their being brought into Court, the information required, shall be given in the presence of, or after notice to, the parties or counsel.

It was error after the jury had retired to allow them to come into Court and instruct them in the absence of the parties or their counsel.—*Redman* vs. *Gulnack*, 5 Cal., 12.

169. In all cases where a jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the Court shall direct.

170. While the jury are absent the Court may adjourn, from time to time, in respect to other business; but it shall nevertheless be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered, or the jury discharged. The Court may direct the jury to bring in a sealed verdict, at the opening of the Court in case of an agreement during a recess, or adjournment for the day. A final adjournment of the Court for the term shall discharge the jury.

171. When the jury have agreed upon their verdict, they shall be conducted into Court by the officer having them in charge. Their names shall then be called, and they shall be asked by the Court, or the Clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, they shall, on being required, declare the same.

172. If the verdict be informal or insufficient, in not covering the whole issue or issues submitted, the verdict may be corrected by the jury under the advice of the Court, or the jury may again be sent out.

173. When the verdict is given, and is not informal or insufficient, the Clerk shall immediately record it, in full, in the minutes, and shall read it to the jury, and inquire of them whether it be their verdict. If any juror

disagree, the jury shall be again sent out; but if no disagreement be expressed the verdict shall be complete, and the jury shall be discharged from the case.

If the record shows what the verdict is, the affidavit of jurors will not be taken to contradict it.—*Gill* vs. *Castro*, 5 Cal., 5; *Wilson* vs. *Berryman*, 5 Cal., 7; *Amsby* vs. *Dickhouse*, 4 Cal., 102.

The Court should direct the verdict of a jury to be recorded as rendered by it. That should be treated as the verdict which the jury actually brings in.—*Moody* vs. *McDonald*, 4 Cal., 297.

ARTICLE III.

THE VERDICT.

174. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant: a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict shall present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.

The finding of a jury will not be disturbed:

a. Unless impeached for fraud, misconduct or mistake.—*Payne* vs. *Jacobs*, 1 Cal., 89; *Perry* vs. *Cochran*, ib., 180; *George* vs. *Law*, ib., 363.

b. Where the evidence in a new trial would warrant the same verdict.—*Folsom* vs. *Tohler*, 1 Cal., 207; *McDermott* vs. *Taylor*, 5 Cal., 58.

c. For conflicting evidence.—*Hoppe* vs. *Robb*, 1 Cal., 373; *Dwinelle* vs. *Henriquez*, ib., 387; *Vogan* vs. *Barrier*, ib., 186; *Johnson* vs. *Pendleton*, ib., 132; *Meyer* vs. *Gorham*, 5 Cal., 14; *Duell* vs. *Bear River Co.*, 5 Cal., 6; *Amsby* vs. *Dickhouse*, 4 Cal., 102; *Israel* vs *Ferguson*, 5 Cal., 26; *Lawson* vs. *McGee*, 6 Cal., Jan'y T.; *Bernard* vs. *Raglan*, 6 Cal., Jan'y T.

d. If incompetent evidence had no influence on the jury.—*Mateer* vs. *Brown*, 1 Cal., 231; *Persse* vs. *Cole*, ib., 369; *Panaud* vs. *Jones*, ib., 488.

The finding of a jury on questions of fact is final and conclusive.—*Perry* vs. *Cochran*, 1 Cal., 180.

The verdict must find separately the facts and conclusions of law.—*Russell* vs. *Armador*, 2 Cal., 305; *Brown* vs. *Brown*, 3 Cal., 111; *Estell* vs. *Chenery*, 3 Cal., 467; *Thornton* vs. *Dougherty*, 5 Cal., 24; *Blood* vs. *Pixley*, 5 Cal., 24.

A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstance connected with the affair," the subject matter of the suit, where no objection was made to him until after the verdict was rendered; and it not appearing that he had formed or expressed an opinion before the trial or was in any way biased in favor of the plaintiff.—*Lawrence* vs. *Collier*, 1 Cal., 37.

Where the verdict is clearly contrary to evidence the Court will reverse the judgment.—*Acquital* vs. *Crowell*, 1 Cal., 191.

Where the verdict is the result of a computation of aggregation and division it is bad.—*Wilson* vs. *Berryman*, 5 Cal., 7.

A verdict may be amended in form so as to make it good in law, but must not affect the substance.—*Truebody* vs. *Jacobsen*, 2 Cal., 269; *Perkins* vs. *Wilson*, 3 Cal., 137; *Little* vs. *Larabee*, 2 Greel., 37.

An informal verdict, if consented to and entered, the informality will not be reviewed.—*Treadwell* vs. *Wells*, 4 Cal., 260.

Jurors will not be allowed to impeach their own verdict.—*Wilson* vs. *Berryman*, 5 Cal., 7; *Gill* vs. *Castro*, 5 Cal., 5; *Amsby* vs. *Dickhouse*, 4 Cal., 102.

175‡. In an action for the recovery of money only, or specific real property, the jury in their discretion, may render a general or special verdict. In all other cases the Court may direct the jury to find a special verdict, in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the Clerk, and entered upon the minutes; where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the Court shall give judgment accordingly.

The Court may direct a special verdict.—*Burritt* vs. *Gibson*, 3 Cal. 396.

A general verdict will conclude all parties who do not answer separately, or demand separate verdicts.—*Winans* vs. *Christy*, 4 Cal. 70.

176. When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury shall also find the amount of the recovery.

177. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property, and may at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

178. Upon receiving a verdict an entry shall be made by the Clerk in the minutes of the Court, specifying the time of trial, the names of the jurors and witnesses, and the verdict; and where a special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

See notes to Sec. 173.

CHAPTER V.

TRIAL BY THE COURT.

179. Trial by jury may be waived by the several parties to an issue of fact, in actions arising on contracts; and with the assent of the Court in other actions, in the manner following:

1st. By failing to appear at the trial.

2d. By written consent, in person or by attorney, filed with the Clerk.

3d. By oral consent in open Court, entered in the minutes. The Court may prescribe by rule what shall be deemed a waiver in other cases.

"The Court may prescribe by rule," held unconstitutional.—*Exline* vs. *Smith*, 5 Cal. 23.

Filing an answer is not such an appearance.—*Zane* vs. *Crowe*, 4 Cal. 112.

180. Upon the trial of an issue of fact by the Court, its decision shall be given in writing, and filed with the Clerk, within ten days after the trial took place. In giving the decision, the facts found and the conclusions of law, shall be separately stated. Judgment upon the decision shall be entered accordingly.

The ten days are only directory.—*Vermuele* vs. *Shaw*, 4 Cal. 214; *Shreve* vs. *Adams*, 5 Cal. 29.

181. On a judgment upon an issue of law, if the taking of an account be necessary to enable the Court to complete the judgment, a reference may be ordered.

CHAPTER VI.

OF REFERENCES, AND TRIAL BY REFEREES.

182. A reference may be ordered upon the agreement of the parties, filed with the Clerk, or entered in the minutes:

1st. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a judgment thereon.

2d. To ascertain a fact necessary to enable the Court to proceed and determine the case.

Hearsay and irrelevant testimony should be excluded by referees.—*Dela Riva* vs. *Berreyesa*, 2 Cal. 195.

Referees should exclude items barred by statute of limitation, if objected to.—ib.

Referees have no power to allow parties to alter pleadings.—ib.; *Bonesteel* vs. *Lynde*, 8 Pr. R. 352.

When an entry upon the minutes recites that "the parties came by their attorneys, and defendant by his attorney moved the Court that the cause be referred;" held, that such reference was made on the appellant's motion, and in one of the modes pointed out by law, "by oral consent in open Court, entered on the minutes."—*Bates* vs. *Visher*, 2 Cal. 355.

A reference cannot be made without consent of adverse party.—*Benham* vs. *Rowe*, 2 Cal. 261; *Smith* vs. *Pollock*, ib. 92; *Seaman* vs. *Mariani*, 1 Cal. 336.

The above held not to apply in equity cases.—*Smith* vs. *Rowe*, 4 Cal. 6.

Our statute concerning referees is in aid of common law remedy by arbitration, and does not alter its principles.—*Tyson* vs. *Wells*, 2 Cal. 122.

A referee appointed merely to take an account between two parties, differs materially from a referee appointed in the stead of a Court, to try and determine a cause.—*Johnson* vs. *Dopman*, 6 Cal. Jan. T.

183. When the parties do not consent, the Court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1st. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein.

2d. When the taking of an account is necessary for the information of the Court before judgment, or for carrying a judgment or order into effect.

3d. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action; or

4th. When it is necessary for the information of the Court in a special proceeding.

Action for balance of account, defense, payment by a promissory note, replication, that plaintiff was induced to receive the note by means of fraudulent representations; held, that the case was not referable under the statute, without the written consent of both parties.—*Seaman* vs. *Mariani*, 1 Cal. 336.

The Court may order a reference to ascertain damages of an injunction issued without a cause.—*Russell* vs. *Elliott*, 2 Cal. 245.

Damages for unlawful detainer is not subject to reference, unless by consent.—*Geeseka* vs. *Brannan*, 2 Cal., 517.

A reference in which there is no order of Court or agreement filed or entered on the minutes, withdraws the cause from the jurisdiction of the Court, and no judgment can be entered upon the report without consent.—*Heslep* vs. *San Francisco*, 4 Cal., 1.

184. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the Court or Judge shall appoint one or more referees, not exceeding

three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection.

See Sec. 529.

The referees need not be sworn.—*Sloan* vs. *Smith*, 3 Cal. 406.

185. Either party may object to the appointment of any person as referee, on one or more of the following grounds:

1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2d. Consanguinity or affinity, within the third degree, to either party.

3d. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party; or being a member of the family of either party; or a partner in business with either party; or being security on any bond or obligation for either party.

4th. Having served as a juror, or been a witness on any trial between the same parties for the same cause of action.

5th. Interest on the part of such person in the event of the action, or in the main question involved in the action.

6th. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7th. The existence of a state of mind in such person evincing enmity against, or bias, to either party.

186. The objections taken to the appointment of any person as referee shall be heard and disposed of by the Court. Affidavits may be read, and any person examined as a witness, as to such objections.

187. The referees shall make their report within ten days after the testimony before them is closed. Their report upon the whole issue shall stand as the decision of the Court, and upon filing the report with the Clerk of the Court, judgment may be entered thereon, in the same manner as if the action had been tried by the Court. The decision of the referees may be excepted to and reviewed in like manner as if made by the Court. When the reference is to report the facts, the report shall have the effect of a special verdict.

The report of a referee must be objected to in a Court below.—*Porter* vs. *Barling*, 2 Cal., 72; *Goodrich* vs. *Marysville*, 5 Cal., 88.

The report of a referee is essentially the same as the award of an arbitration.—*Grayson* vs. *Guild*, 4 Cal., 122.

It must be taken advantage of by moving to set it aside, as on motion for a new trial. —*Sloan* vs. *Smith*, 3 Cal., 406; *Grayson* vs. *Guild*, 4 Cal., 122.

The report of a referee should state the facts found and conclusions of law thereup-

on.—*Church* vs. *Erben*, 4 Sand., 691; *Van Steenburgh* vs. *Hoffman*, 6 Pr. R., 492; *Deming* vs. *Post*, 1 Code Rep., 121; *Lambert* vs. *Smith*, 3 Cal., 408; *Case* vs. *Maxey*, 5 Cal., 65; *McKim* vs. *Redfern*, 5 Cal. 59.

The Supreme Court in a Chancery case will correct the errors of an erroneous judgment on the report of a referee, or the erroneous setting aside of the same.—*Grayson* vs. *Guild*, 4 Cal., 122.

The correctness of the order setting aside the report of facts found by the referee, if it was questioned and excepted to, can be reviewed upon appeal after final judgment.—*McHenry* vs. *Moore*, 5 Cal., 7.

The report of a referee upon the facts of a case will be considered the same as the verdict of a jury.—*Walton* vs. *Minturn*, 1 Cal., 362; *Case* vs. *Maxey*, 5 Cal., 65; *Goodrich* vs. *Marysville*, 5 Cal., 88.

Where there is conflicting evidence the report of the referee will not be set aside.—*Fierro* vs. *Graves*, 6 Cal., Jan'y T.

CHAPTER VII.

GENERAL PROVISIONS RELATING TO TRIALS.

ARTICLE I.

EXCEPTIONS.

188. An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, Court or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material, and affect the substantial rights of the parties.

Where the Court below tries the cause without a jury, the proper mode of reserving questions of law, is to ask the Court to decide them and note the refusal in a bill of exceptions—*Griswold* vs. *Sharpe*, 2 Cal., 17.

189. The point of the exception shall be particularly stated, and may be delivered in writing to the Judge, or if the party require it, shall be written down by the Clerk; when delivered in writing, or written down by the Clerk, it shall be made conformable to the truth, or be at the time corrected until it is so made conformable. When not delivered in writing, or written down as above, it may be entered in the Judge's minutes and afterwards settled in a statement of the case, as provided in this Act.

Where under the 271st [663] Section of the Act to regulate proceedings in civil cases, the evidence is taken down by the Clerk in the Court below on motion of a party, a transcript of it, certified by him, is a substitute for a bill of exceptions or statement of facts, in the absence of such bill or statement. Decisions contravening the plain letter

of the statute are not binding as authority.—*Ingraham* vs. *Gildemeester*, 2d Cal., 161.

A mere transcript of the evidence taken down by the Clerk is no part of the record, unless made so by bill of exceptions.—*Wilson* vs. *Middleton*, 2 Cal., 54.

190. No particular form of exception shall be required. The objection shall be stated, with so much of the evidence, or other matter, as is necessary to explain it, but no more; and the whole as briefly as possible.

Where an exception is taken to the decision of a Court refusing a non-suit, it devolves upon the plaintiff, on the settlement of the bill, to see that all the evidence material for him in sustaining the decisions complained of, is inserted in the bill of exceptions.—*Ringgold* vs. *Haven*, 1 Cal., 108.

191. When a cause has been tried by the Court, or by referees, and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be deemed excepted to, on motion for a new trial or on appeal, without any special notice that an exception is taken thereto.

ARTICLE II.

NEW TRIALS.

192. A new trial is a re-examination of an issue of fact in the same Court, after a trial and decision by a jury, Court or referees.

A new trial should not be granted where it is apparent the verdict of the jury would be the same—*Buckelew* vs. *Chipman*, 5 Cal., 73; *Tohler* vs. *Folsom*, 1 Cal., 207.

A new trial should be granted where justice requires it.—*Ross* vs. *Austill*, 2 Cal., 183; *Bartlett* vs. *Hogden*, 3 Cal., 55; *Hoyt* vs. *Saunders*, 4 Cal., 345.

The power to grant new trials is one of legal discretion; the abuse of it will only justify interference by an appelate Court.—*Speck* vs *Hoyt*, 3 Cal., 413; *Drake* vs. *Palmer*, 2 Cal., 177; *Berryman* vs. *Wilson*, 5 Cal., 55; *Taylor* vs. *McKinley*, 4 Cal., 104; *Watson* vs. *McClay*, 4 Cal., 288; *Bartlett* vs. *Hogden*, 3 Cal., 55; *Buell* vs. *Bear River Co.*, 5 Cal., 6; *Wood* vs. *Fobes*, 5 Cal., 14; *Cohen* vs. *Gower*, 5 Cal., 55.

193. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

1st. Irregularity in the proceedings of the Court, jury or adverse party, or any order of the Court, or abuse of discretion by which either party was prevented from having a fair trial.

2d. Misconduct of the jury.

3d. Accident, or surprise, which ordinary prudence could not have guarded against.

4th. Newly discovered evidence, material for the party making the

application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5th. Excessive damages, appearing to have been given under the influence of passion, or prejudice.

6th. Insufficiency of the evidence to justify the verdict, or other decision, or that it is against law.

7th. Error in law, occurring at the trial, and excepted to by the party making the application.

3d. Where surprise is set up by non-attendance of witness, reasonable diligence must be shown.—*Bartlett* vs. *Hogden*, 3 Cal., 55; *Rogers* vs. *Huie*; 1 Cal., 429; *Brooks* vs. *Lyon*, 3 Cal., 113.

If improper evidence be permitted to be given to the jury a new trial will be granted, unless the Court can see that such evidence could have had no influence upon the verdict.—*Santillan* vs. *Moses*, 1 Cal., 92.

Surprise requires a continuance.—*Ross* vs. *Austill*, 2 Cal., 183.

4th. The newly discovered evidence should be set forth in full, on motion.—*Perry* vs. *Cochran*, 1 Cal., 180; *Burritt* vs. *Gibson*, 3 Cal., 396.

The newly discovered evidence must appear to be incontrovertible and conclusive.—*Buckelew* vs, *Chipman*, 5 Cal., 73; *Bartlett* vs. *Hogden*, 3 Cal., 55.

5th. *George* vs. *Law*, 1 Cal., 363; *Potter* vs. *Seale*, 5 Cal., 88; *Payne* vs. *Pacific M. S. S. Co.*, 1 Cal., 33.

194. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last Section it shall be made upon affidavit; for any other cause it shall be made upon a statement prepared as provided in the next Section.

195. The party intending to move for a new trial shall give notice of the same within two days after the trial, and shall, within five days after such notice, prepare and file with the Clerk the affidavit required by the last Section, or a statement of the grounds upon which he intends to rely. If no affidavit or statement be filed within five days after the notice, the right to move for a new trial shall be deemed waived. The statement shall contain so much of evidence, or reference thereto, as may be necessary to explain the grounds taken and no more. Such statement, when containing any portion of the evidence of the case, and not agreed to by the adverse party, shall be settled by the Judge upon notice. On the argument, reference may also be made to the pleadings, depositions, and documentary evidence on file, and to the minutes of the Court. If the application be made upon affidavits filed, the adverse party may use counter affidavits on the hearing. Any counter affidavits shall be filed with the Clerk one day, at least, previous to the hearing.

A motion for a new trial must be noticed within statute time.—*Elliott* vs. *Osborne*, 1 Cal., 396; *Dennison* vs. *Smith*, ib., 427.

If no statement be filed, the order will be set aside.—*Leech* vs. *Allen*, 2 Cal., 95; *Hill* vs. *White*, 2 Cal., 306.

The statement must be agreed to or signed by the Judge.—*Lurvey* vs. *Wells*, 5 Cal., 6; *Linn* vs. *Twist*, 3 Cal., 89; *Harley* vs. *Young*, 4 Cal., 284.

The Court may extend the time for filing the statement.—*Wood* vs. *Fobes*, 5 Cal., 14.

A motion for a new trial stays the operation of the judgment until it can be heard and determined, and is not affected by the adjournment of the Court.—*Lurvey* vs. *Wells*, 4 Cal., 106.

The Court may impose terms in granting or refusing a new trial.—*Benedict* vs. *Cozzens*, 4 Cal., 381.

When a cause is tried by a Judge alone without a jury the record must disclose a finding by him of the facts and a statement of his conclusions of law upon the case without which there is no basis to support a judgment.—*Hoagland* vs. *Clary*, 2 Cal., 474.

Should the statement not be served until after the statute time expires, a demand by the opposite counsel to extend the time to file amendments, on being granted, waives the irregularity.—*Butler* vs. *Howes*, 12th Dist. Court.

196. The application for a new trial shall be made at the earliest period practicable after filing the affidavit or statement.

Baldwin vs. *Kramer*, 2 Cal., 582.

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

197. When trial by jury has been had, judgment shall be entered by the Clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the Court order the case to be reserved for argument, or further consideration, or grant a stay of proceedings.

The District Court may at any time thereafter grant relief against a judgment unjustly or improperly obtained.—*People* vs. *Lafarge*, 3 Cal., 130; *Bidleman* vs. *Kewen*, 2 Cal., 248.

A Court may at any time render or amend a judgment nunc pro tunc where the record discloses that is incorrectly given as the judgment of the Court.—*Morrison* vs. *Dopman*, 3 Cal., 255.

But if there is record evidence to show that the judgment was different from the one entered, the latter must stand until reversed.—Ib.

No Court will be permitted, after the lapse of a term, to open a judgment upon motion to render a new judgment.—Ib. See Sec. 144.

198‡. When the case is reserved for argument, or further consideration, as mentioned in the last Section, it may be brought by either party before the Court for argument.

199. If a counter claim, established at the trial, exceed the plaintiff's demand, so established, judgment for the defendant shall be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

200. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the propty, or the value thereof in case a return cannot be had, and damages for taking and withholding the same.

201. The Clerk shall keep among the records of the Court, a book for the entry of judgments, to be called the "Judgment Book," in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action.

202. If a party die after a verdict of decision upon any issue of fact, and before judgment, the Court may nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate.

203. Immediately after entering the judgment, the Clerk shall attach together and file the following papers, which shall constitute the judgment roll:

1st. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum endorsed on the complaint, that the default of the defendant in not answering was entered, and a copy of the judgment.

2d. In all other cases, the summons, pleadings, and a copy of the judgment, and any orders relating to a change of the parties.

204. Immediately after filing a judgment roll, the Clerk shall make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed, it shall become a lien upon all the real property of the judgment debtor, not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied.

The liens of judgment creditors, if the land be sold on a prior judgment, are transferred to the surplus, which must be applied to them, in their order of priority.—*Averill* vs. *Loucks*, 6 Barb., 470.

205. The docket mentioned in the last Section, is a book which the Clerk shall keep in his office, with each page divided into eight columns,

and headed as follows: Judgment Debtors; Judgment Creditors; Judgment; Time of Entry; Where entered in Judgment Book; Appeals, when taken; Judgment of Appellate Court; Satisfaction of Judgment, when entered. If judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The name of the defendants shall be entered in the docket in alphabetical order.

206. The docket kept by the Clerk shall be open at all times during office hours, for the inspection of the public, without charge; and it shall be the duty of the Clerk to arrange the several dockets kept by him, in such a manner as to facilitate their inspection.

207. A transcript of the original docket certified by the Clerk, may be filed with the Recorder of any other county, and from the time of the filing, the judgment shall become a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied.

208. Satisfaction of a judgment may be entered in the Clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the Clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or within one year after the judgment by the attorney, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact, otherwise than upon an execution, it shall be the duty of the party, or attorney, to give such acknowledgment, and upon motion the Court may compel it, or may order the entry of satisfaction to be made without it.

TITLE VII.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.

THE EXECUTION.

209. The party in whose favor judgment is given, may, at any time

within five years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter.

210. The writ of execution shall be issued in the name of the people, sealed with the seal of the Court, and subscribed by the Clerk, and shall be directed to the Sheriff, and shall intelligibly refer to the judgment, stating the Court, the county where the judgment roll is filed, the name of the parties, the judgment, and if it be for money, the amount thereof, and the amount actually due thereon, and shall require the Sheriff substantially as follows:

1st. If it be against the property of the judgment debtor, it shall require the Sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the Recorder of such county, stating such day, or at any time thereafter.

2d. If it be against real or personal property, in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the Sheriff to satisfy the judgment, with interest, out of such property.

3d. If it be against the person of the judgment debtor, it shall require the Sheriff to arrest such debtor, and commit him to the jail of the county, until he pay the judgment, with interest, or be discharged according to law.

4th. If it be for the delivery of the possession of real or personal property, it shall require the Sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the Sheriff to satisfy any costs, damages, rents, or profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and is sufficient personal property cannot be found, then out of real property, as provided in the first subdivision of this section.

211. When a writ of execution is issued on a judgment recovered against two or more persons, in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it shall direct the Sheriff to satisfy the judgment out of the joint property

of all the defendants, and the individual property only of the defendants who were served, or who appeared in the action. In other respects the writ shall contain the directions specified in the first subdivision of the last Section.

212. The execution may be made returnable at any time, not less than ten, nor more than sixty days after its receipt by the Sheriff, to the Clerk with whom the judgment roll is filed.

213. Where a judgment requires the payment of money, or the delivery of real or personal property, the same shall be enforced in those respects, by execution. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced.

214. After the lapse of five years from the entry of judgment, an execution shall be issued only by leave of the court, on motion. Such leave shall not he given, unless it be established by the oath of the party or other proof, that the judgment, or some part thereof, remains unsatisfied and due.

Hurlbut vs. *Fuller*. 3 Code R., 55; *Currie* vs. *Noyes*, 1 Code Rep. N. S., 198.

215. Notwithstanding the death of a party after the judgment, execution thereon against his property may, upon permission granted by the Probate Court, be issued and executed in the same manner, and with the same effect, as if he were still living.

216. Where the execution is against the property of the judgment debtor, it may be issued to the Sheriff of any county in the State. Where it requires the delivery of real or personal property, it shall be issued to the Sheriff of the county where the property, or some part thereof is situated. Executions may be issued, at the same time, to different counties.

217‡. All goods, chattels, moneys, and other property, real and personal, of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, shall be liable to execution.

Until a levy, property shall not be affected by the execution.

Shares and interests in any corporation or company, and debts and credits and other property not capable of manual delivery, may be attached in execution in like manner as upon writs of attachment.

Gold dust shall be returned by the officer as so much money collected, at is current value, without exposing the same to sale.

218. If the property levied on, be claimed by a third person as his property, the Sheriff shall summon from his county six persons qualified as jurors, between the parties to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses shall be sworn by the Sheriff, and if their verdict be in favor of the claimant, the Sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the Sheriff, and the witnesses, shall be paid by the claimant, if the verdict be against him; otherwise by the plaintiff. On the trial the defendant and the claimant may be examined by the plaintiff as witnesses.

A bond of indemnity given to the Sheriff, upon execution, is not invalidated by the fact that it was given after levy and sale.— *Westervelt* vs. *Frost*, 1 Abbott, 74.

219‡. The following property shall be exempt from execution, except as herein otherwise specially provided.

1st. Chairs, tables, desks and books to the value of one hundred dollars belonging to the judgment debtor.

2d. Necessary household, table and kitchen furniture belonging to the judgment debtor, including stove, stove-pipe and stove furniture, wearing apparel, beds, bedding and bedsteads, and provisions actually provided for individual or family use sufficient for one month.

3d. The farming utensils or implements of husbandry of the judgment debtor, also two oxen, or two horses, or two mules and their harness, two cows and one cart or wagon, and food for such oxen, horses, cows or mules for one month.

4th. The tools and implements of a mechanic necessary to carry on his trade, the instruments and chests of a surgeon, physician, surveyor and dentist, necessary to the exercise of their profession, with the professional library, and the law libraries of an attorney or counsellor.

5th. The tent and furniture, including a table, camp stools, bed and bedding of a miner; also his rocker, shovels, spades, wheelbarrows, pumps and other instruments used in mining, with provisions necessary for his support for one month.

6th. Two oxen, or two horses or two mules, and their harness, and one cart or wagon, by the use of which a cartman, teamster, or other laborer, habitually earns his living; and food for such oxen, horses or mules for

one month; and a horse, harness and vehicle used by a physician or surgeon in making his professional visits.

7th. All fire engines, with the carts, buckets, hose, and apparatus thereto appertaining, of any fire company or department organized under any law of this State.

8th. All arms and accoutrements required by law to be kept by any person. But no article mentioned in this Section shall be exempt from execution issued on a judgment recovered for its price, or upon a mortgage thereon.

9th. All court-houses, jails, public offices and buildings, lots, grounds, personal property belonging to any county of this State, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings appertaining to the Fire Departments, and the lots and grounds thereunto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use.

6th. A baker's horse or wagon is not exempt.—*Kennedy* vs. *Gorham*, 12th Dist. Court.

A hackney coach is not exempt.—*Quigley* vs. *Gorham*, 5 Cal., 85.

County property exempt from execution by Act May 1, 1754, p. 148:

Court house, jail, public buildings, together with any lots or land belonging to the county. The fixtures, furniture, books, papers and appurtenances belonging and appertaining to the court house, jail and public officers.

220. The Sheriff shall execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, or depositing the amount with the Clerk of the Court; any excess in the proceeds over the judgment and the Sheriff's fees shall be returned to the judgment debtor. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and the Sheriff's fees, within the view of the Sheriff, he shall levy only on such part of the property as the judgment debtor may indicate: Provided that the judgment debtor may indicate at time of the levy, such part; and provided, that the property indicated be amply sufficient to satisfy such judgment and fees.

A Sheriff, upon whom a fine has been imposed by the Court to the amount of an execution issued to him, for wilful neglect of his duty in regard to it, and who, pursuant to the order of the Court, has paid the fine to the judgment creditor, has no authority to enforce the execution against the debtor for his own indemnity. Nor has he authority to do so where the amount of the fine was paid with his moneys by a third person, and the judgment assigned to such third person to be held for the Sheriff's benefit.

An officer cannot execute final process in his own favor or for his own benefit.—*Carpenter* vs. *Stilwell*, 1 Kern., 61.

221. Before the sale of property on execution, notice thereof shall be given as follows:

1st. In case of perishable property, by posting written notice of the time and place of sale, in three public places of the township or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property:

2d. In case of other personal property, by posting a similar notice in three public places of the township or city where the sale is to take place, not less than five nor more than ten days successively:

3d. In case of real property, by posting a similar notice, particularly describing the property, for twenty days successively, in three public places of the township or city where the property is situated, and also where the property is to be sold; and publishing a copy thereof once a week, for the same period, in a newspaper in the county, if there be one.

See Sec. 654.

222. An officer selling without the notice prescribed by the last Section, shall forfeit five hundred dollars to the aggrieved party, in addition to his actual damages; and a person wilfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment, (if the judgment be satisfied before sale,) shall forfeit five hundred dollars.

223. All sales of property under execution shall be made at auction to the highest bidder, and shall be made between the hours of nine in the morning, and five in the afternoon; after sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution, nor his deputy, shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall thus be sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, which can be sold to advantage separately; and the Sheriff shall be bound to follow such directions.

The statute regulating Sheriff's sales of real estate does not design to invest a purchaser with the title until six months after the sale.—*Duprey* vs. *Duprey*, 4 Cal., 196.

224. If a purchaser refuse to pay the amount bid by him for property

struck off to him at a sale under execution, the officer may again sell the property at any time, to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, without costs, by motion upon previous notice of five days before any Court, or before any Justice of the Peace, if the same shall not exceed his jurisdiction.

225. Such Court or Justice shall proceed in a summary manner and give judgment and issue execution therefor forthwith, but the defendant may claim a jury. And the same proceedings may be had against any subsequent purchaser who shall refuse to pay, and the officer may, in his discretion, thereafter reject the bid of any person so refusing.

226. The two preceding Sections shall not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

227. When the purchaser of any personal property capable of manual delivery shall pay the purchase money, the officer making the sale shall deliver to the purchaser the property, and if desired shall execute and deliver to him a certificate of the sale and payment. Such certificate shall convey to the purchaser all the right, title and interest which the debtor had in and to such property on the day the execution was levied.

228. When the purchaser of any personal property not capable of manual delivery shall pay the purchase money, the officer making the sale shall execute and deliver to the purchaser a certificate of sale and payment. Such certificate shall convey to the purchaser all right, title and interest which the debtor had in and to such property on the day the execution was levied.

Where process of a Court, as an execution, commanding the Sheriff to deliver possession of a chattel has been fully and completely executed, the power of the Sheriff under it, and the authority of the Court, cease.—*Loring* vs. *Illsley*, 1 Cal., 24.

A purchaser under Sheriff's sale has no right to the possession of the premises until the expiration of the time allowed for redemption.—*Middleton* vs. *Guy*, 5 Cal., 78.

229. Upon a sale of real property, when the estate is less than a a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases the real property shall be subject to redemption, as provided in this chapter. The officer shall give to the purchaser a certificate of the sale, containing:

1st. A particular description of the property sold:

2d. The price bid for each distinct lot or parcel:

3d. The whole price paid:

4th. When subject to redemption it shall be so stated, a duplicate of which certificate shall be filed by the officer with the Recorder of the county.

230. Property sold subject to redemption, as provided in the last Section, or any part separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1st. The judgment debtor, or his successor in interest, in the whole or any part of the property.

2d. A creditor, having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this Section, are, in this chapter, termed redemptioners.

The redemption should be beneficially construed.—*Kent* vs. *Laffan*, 2 Cal., 595.

A party, (the assignee of the judgment debtor,) is bound to pay the whole of the plaintiff's judgment in order to redeem, and not merely his bid with interest. The lien of the judgment continues till the balance is paid.—*Vandyke* vs. *Herman*, 3 Cal., 295.

Upon the redemption the redeeming party has a right to an assignment of the mortgage redeemed, and, if it be recorded, a right to require the mortgagee to acknowledge the assignment.—*Averill* vs. *Taylor*, 4 Seld., 44.

231. The judgment debtor, or a redemptioner, may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase, with eighteen per cent. thereon in addition, together with the amount of any assessments or taxes which the purchaser may have paid thereon after the purchase, and interest on such amount; and if the purchaser be also a creditor, having a lien prior to that of the redemptioner, the amount of such lien with interest.

When property was sold under judgment prior to the passage of the Act providing for redemption, there is no right of redemption.—*People* vs. *Hays*, 4 Cal., 127; *Seale* vs. *Wardwell*, 5 Cal., 70.

232. If the property be so redeemed by a redemptioner, either the judgment debtor, or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with six per cent. thereon in addition, and the amount of any assessments or taxes which the said last redemptioner may have paid thereon, after the redemption by him, with interest on such amount; and the amount of any liens held by said last redemptioner prior to his own, with interest. The property may be again, and as often as the debtor or redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with six per cent. thereon in addition, and the amount of any assessments or taxes

which the said last previous redemptioner paid after the redemption by him, with interest thereon; and the amount of any liens held by the said last redemptioner, previous to his own, with interest. Notice of redemption shall be given to the Sheriff. If no redemption be made within six months after the sale, the purchaser shall be entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, the time for redemption shall have expired, and the last redemptioner shall be entitled to a Sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effects of the sale shall be terminated, and he be restored to his estate.

A mandamus will not lie against a Sheriff to compel him to make a deed to land to a purchaser at execution sale who refuses to pay the purchase money, for the reason that he is the oldest judgment and execution creditor, and entitled to the money; especially when there is an unsettled contest as to the question of lien.—*Williams* vs. *Smith*, 6 Cal., Jan'y T.

A Sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the Sheriff. If executed in his own name, it is decisive against the party claiming under it.—*Lewes* vs. *Thompson*, 3 Cal., 266.

233. The payment mentioned in the last two Sections may be made to the purchaser or redemptioner, as the case may be, or for him, to the officer who made the sale; and a tender or the money shall be equivalent to payment.

A payment to the Sheriff for the redemption of land sold under execution, cannot be made in certified checks.—*People* vs. *Hays*, 4 Cal., 127.

Where land was sold at Sheriff's sale, the proceeds of which did not amount to the whole judgment, leaving a balance unpaid, and was afterwards redeemed under the statute, held, that the party redeeming, (who was an assignee of the judgment debtor,) was bound to pay the whole of the plaintiff's judgment, and not merely his bid with interest, and eighteen per cent., and that the lien of the judgment continued until the balance was paid.—*Vandyke* vs. *Herman*, 3 Cal., 295.

234. A redemptioner shall produce to the officer or person from whom he seeks to redeem, and serve with his notice to the Sheriff,

1st. A copy of the docket of the judgment under which he claims the right to redeem, certified by the Clerk of the Court, or of the county where the judgment is docketed; or if he redeem upon a mortgage or other lien, a note of the record thereof certified by the Recorder.

2d. A copy of an assignment necessary to establish his claim, verified by the affidavit of himself, or of subscribing witnesses thereto: and

3d. An affidavit by himself, or his agent, showing the amount then actually due on the lien.

235. Until the expiration of the time allowed for redemption, the Court may restrain the commission of waste on the property, by order

granted with or without notice, on the application of the purchaser or the judgment creditor. But it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family while he occupies the property.

236. The purchaser from the time of a sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof.

237. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the recovery be in consequence of the irregularity in the proceedings concerning the sale, the judgment may, by order of the Court, upon notice to the judgment debtor, be revived, and a new execution issued for the price paid on the sale, with interest. Such judgment shall be a lien on the real estate of the judgment debtor, only from the time of its revival.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

238. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the Sheriff of the county where he resides; or if he do not reside in this State, to the Sheriff of the county where the judgment roll is filed; is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, shall be entitled to an order from the Judge of the Court, or a County Judge, requiring such judgment debtor to appear and answer concerning his property, before such Judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor shall be required to attend before a Judge or referee out of the county in which

and headed as follows: Judgment Debtors; Judgment Creditors; Judgment; Time of Entry; Where entered in Judgment Book; Appeals, when taken; Judgment of Appellate Court; Satisfaction of Judgment, when entered. If judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The name of the defendants shall be entered in the docket in alphabetical order.

206. The docket kept by the Clerk shall be open at all times during office hours, for the inspection of the public, without charge; and it shall be the duty of the Clerk to arrange the several dockets kept by him, in such a manner as to facilitate their inspection.

207. A transcript of the original docket certified by the Clerk, may be filed with the Recorder of any other county, and from the time of the filing, the judgment shall become a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied.

208. Satisfaction of a judgment may be entered in the Clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the Clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or within one year after the judgment by the attorney, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact, otherwise than upon an execution, it shall be the duty of the party, or attorney, to give such acknowledgment, and upon motion the Court may compel it, or may order the entry of satisfaction to be made without it.

TITLE VII.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.

THE EXECUTION.

209. The party in whose favor judgment is given, may, at any time

within five years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter.

210. The writ of execution shall be issued in the name of the people, sealed with the seal of the Court, and subscribed by the Clerk, and shall be directed to the Sheriff, and shall intelligibly refer to the judgment, stating the Court, the county where the judgment roll is filed, the name of the parties, the judgment, and if it be for money, the amount thereof, and the amount actually due thereon, and shall require the Sheriff substantially as follows:

1st. If it be against the property of the judgment debtor, it shall require the Sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the Recorder of such county, stating such day, or at any time thereafter.

2d. If it be against real or personal property, in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the Sheriff to satisfy the judgment, with interest, out of such property.

3d. If it be against the person of the judgment debtor, it shall require the Sheriff to arrest such debtor, and commit him to the jail of the county, until he pay the judgment, with interest, or be discharged according to law.

4th. If it be for the delivery of the possession of real or personal property, it shall require the Sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the Sheriff to satisfy any costs, damages, rents, or profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and is sufficient personal property cannot be found, then out of real property, as provided in the first subdivision of this section.

211. When a writ of execution is issued on a judgment recovered against two or more persons, in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it shall direct the Sheriff to satisfy the judgment out of the joint property

of all the defendants, and the individual property only of the defendants who were served, or who appeared in the action. In other respects the writ shall contain the directions specified in the first subdivision of the last Section.

212. The execution may be made returnable at any time, not less than ten, nor more than sixty days after its receipt by the Sheriff, to the Clerk with whom the judgment roll is filed.

213. Where a judgment requires the payment of money, or the delivery of real or personal property, the same shall be enforced in those respects, by execution. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced.

214. After the lapse of five years from the entry of judgment, an execution shall be issued only by leave of the court, on motion. Such leave shall not he given, unless it be established by the oath of the party or other proof, that the judgment, or some part thereof, remains unsatisfied and due.

Hurlbut vs. *Fuller*. 3 Code R., 55; *Currie* vs. *Noyes*, 1 Code Rep. N. S., 198.

215. Notwithstanding the death of a party after the judgment, execution thereon against his property may, upon permission granted by the Probate Court, be issued and executed in the same manner, and with the same effect, as if he were still living.

216. Where the execution is against the property of the judgment debtor, it may be issued to the Sheriff of any county in the State. Where it requires the delivery of real or personal property, it shall be issued to the Sheriff of the county where the property, or some part thereof is situated. Executions may be issued, at the same time, to different counties.

217‡. All goods, chattels, moneys, and other property, real and personal, of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, shall be liable to execution.

Until a levy, property shall not be affected by the execution.

Shares and interests in any corporation or company, and debts and credits and other property not capable of manual delivery, may be attached in execution in like manner as upon writs of attachment.

Gold dust shall be returned by the officer as so much money collected, at is current value, without exposing the same to sale.

218. If the property levied on, be claimed by a third person as his property, the Sheriff shall summon from his county six persons qualified as jurors, between the parties to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses shall be sworn by the Sheriff, and if their verdict be in favor of the claimant, the Sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the Sheriff, and the witnesses, shall be paid by the claimant, if the verdict be against him; otherwise by the plaintiff. On the trial the defendant and the claimant may be examined by the plaintiff as witnesses.

A bond of indemnity given to the Sheriff, upon execution, is not invalidated by the fact that it was given after levy and sale.— *Westervelt* vs. *Frost*, 1 Abbott, 74.

219‡. The following property shall be exempt from execution, except as herein otherwise specially provided.

1st. Chairs, tables, desks and books to the value of one hundred dollars belonging to the judgment debtor.

2d. Necessary household, table and kitchen furniture belonging to the judgment debtor, including stove, stove-pipe and stove furniture, wearing apparel, beds, bedding and bedsteads, and provisions actually provided for individual or family use sufficient for one month.

3d. The farming utensils or implements of husbandry of the judgment debtor, also two oxen, or two horses, or two mules and their harness, two cows and one cart or wagon, and food for such oxen, horses, cows or mules for one month.

4th. The tools and implements of a mechanic necessary to carry on his trade, the instruments and chests of a surgeon, physician, surveyor and dentist, necessary to the exercise of their profession, with the professional library, and the law libraries of an attorney or counsellor.

5th. The tent and furniture, including a table, camp stools, bed and bedding of a miner; also his rocker, shovels, spades, wheelbarrows, pumps and other instruments used in mining, with provisions necessary for his support for one month.

6th. Two oxen, or two horses or two mules, and their harness, and one cart or wagon, by the use of which a cartman, teamster, or other laborer, habitually earns his living; and food for such oxen, horses or mules for

253. If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building or any uncultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

254. An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.

A person cannot be dispossessed of his property under an order of Court proceeding ex parte on the statement of the plaintiff and without citation or notice to the defendant.—*Ladd* vs. *Stevenson*, 1 Cal., 18.

In an action for the recovery of land if the plaintiff proves no title, the defendants being in possession cannot be ousted, but if the defendants have entered, claiming under the plaintiff and in subordination to his title, they are estopped from questioning it.—*Hoen* vs. *Simmons*, 1 Cal. 119.

A deed purporting to convey real estate, executed by an agent or attorney in his own name, instead of the name of his principal, is not binding upon the latter, and does not transfer the title to the property.—*Fisher* vs. *Salmon*, 1 Cal., 413.

A party already having the legal and equitable title, cannot sue for a further conveyance.—*Truebody* vs. *Jacobson*, 2 Cal., 82.

In a possessory action it is sufficient for the plaintiff to state that he was lawfully entitled to the possession of the premises without setting out the evidence of his right.—*Godwin* vs. *Stebbins*, 2 Cal., 103.

A vendor has a lien on the land sold, for the purchase money, unless has taken security for its payment, though he has executed the conveyance.

And where he has not conveyed the title, his position is analagous to that of a mortgagee.

A purchaser in possession cannot reclaim the purchase money on account of defect in the title, unless he has been evicted or disturbed.

A party cannot ask the recision of a contract on account of an obstacle to its completion, caused by his own fault.

Caveat emptor applies in sales of real estate, where there is no fraud, warranty, &c. —*Salmon* vs. *Hoffman*, 2 Cal., 138.

Where the title of the plaintiff is inchoate and incomplete, he cannot sustain an ejectment, and the Court properly rejected such title as testimony.—*Leese* vs. *Clark*, 3 Cal., 18.

To sustain a grant from a town, it is necessary to show that the lands granted were the property of the town.

When such grant contains a surplus, the title is good for the whole lot, defeasible for the surplus.—*Vanderslice* vs. *Hanks*, 3 Cal., 28; *Touchard* vs. *Touchard*, 5 Cal., 41.

A deed for "one-half my lot," accompanied by proof that the grantor owned at the time but one lot in the place, is not void for uncertainity in the description.

But if such deed is not void, it can only convey an undivided half of the said lot, and the grantee can only take as tenant in common with the grantor.

One tenant in common cannot sustain an action of forcible entry and detainer against another for holding over. He must first resort to a Court of Equity for a partition of the bond in dispute.—*Lick* vs. *O'Donnell*, 3 Cal., 59.

A party is not allowed to controvert the declaration he has made by deed.—*Tartar* vs. *Hall*, 3 Cal., 263.

By the laws of Mexico, towns were invested with the ownership of lands.

By the laws, usage, and custom of Mexico, the Alcaldes were the heads of the Ayuntamientos or town Councils; were the executive officers of the towns, and rightfully exercised the power of granting lots within the towns, which were the property of the towns.—*Cohas* vs. *Raisin*, 3 Cal., 443; *Coddington* vs. *McHenry*, 5Cal., 38; *Seale* vs. *Wardwell*, 5 Cal., 70.

Possession is always prima facie evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser.

The allegation of possession at the time of the ouster complained of, is a sufficient allegation of title to sustain the declaration.—*Hutchinson* vs. *Perley*, 4 Cal., 33; *Plume* vs. *Seward*, 4 Cal., 94,

In actions for the recovery of land, possession is prima facie evidence of title, and this principle is firmly fixed in all common law jurisprudence.—*Hicks & Martin* vs. *Davis*, 4 Cal., 67.

Possession, coupled with the color of title, must prevail, except where a better title is shown in the defendants; and where a plaintiff in ejectment pleads a fee simple title he is not compelled to prove the same; but can properly rely upon prior possession, if he choose to do so.—*Winans* vs. *Christy*, 4 Cal., 70.

Where a tract of land sold for a gross sum is described by specific boundaries and as containing so many acres, more or less, the vendor cannot recover for the overplus, if in a survey it can be ascertained that more land is contained in the tract than the precise amount in the deed.—*Chipman* vs. *Briggs*, 5 Cal., 24.

A vendor of real estate who makes no conveyance, but gives a bond conditioned for the execution of a conveyance, on payment of the purchase money by the vendee, has an equitable lien on the land for the purchase money, and holds the legal title as a security for the enforcement of his lien.—*Gouldin* vs. *Buckelew*, 4 Cal., 107.

255. If the defendant in such action disclaim, in his answer, any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs.

256. In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact; and the plaintiff may recover damages for withholding the property.

257. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiffs, in good faith, the value of such improvements shall be allowed as a set-off against such damages.

258. The Court in which an action is pending for the recovery of real property may on motion, upon notice by either party, for good cause shown, grant an order allowing such party the right to enter upon the

property, and make survey and measurement thereof, for the purposes of the action.

259. The order shall describe the property, and a copy thereof shall be served on the owner or occupant; and thereupon such party may enter upon the property, with the necessary surveyors and assistants, and may make such survey and measurements; but if any unnecessary injury be done to the property, he shall be liable therefor.

260. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

261. The Court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or after a sale on execution before a conveyance.

262. When real property shall have been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession, after sale and before possession is delivered under the conveyance.

To enable the plaintiff to recover on an action of ejectment, founded on prior possession, he must allege and prove an actual ouster by defendants, or those under whom he holds.—*Treadwell* vs. *Paine*, 5 Cal., 36; *Watson* vs. *Zimmerman*, 6 Cal., Jan'y T.

An action cannot be maintained against A to recover damages for a trespass to real estate committed by B.—*Stevenson* vs. *Lick*, 1 Cal., 128.

263. An action for the recovery of real property against a person in possession, cannot be prejudiced by an alienation made by such person, either before or after the commencement of the action.

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

264‡. When several persons hold and are in possession of real property, as joint tenants, or as tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein;

and for a sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

265. The interests of all persons in the property, whether such persons be known or unknown, shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

266. No persons who have or claim any liens upon the property, by mortgage, judgment, or otherwise, need be made parties to the action, unless such liens be matters of record.

267. Immediately after filing the complaint, the plaintiff shall file with the Recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing, it shall be deemed notice to all persons.

268. The summons shall be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown, who have or claim any interest in the property.

Two corporations cannot hold land together as joint tenants.—*De Witt* vs. *San Francisco*, 2 Cal., 289.

269. If a party having a share or interest is unknown, or any one of the known parties reside out of the State, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party, by publication, as in other cases. When publication is made, the summons, as published, shall be accompanied by a brief description of the property which is the subject of the action.

270. The defendants who have been personally served with the summons, and a certified copy of the complaint, shall set forth in their answers, fully and particularly, the nature and extent of their interest in the property; and if such defendants claim a lien upon the property, by mortgage, judgment, or otherwise, they shall state the amount and date of the same,

and the amount remaining due thereon, and whether the amount has been secured in any other way or not; and if secured, the extent and nature of the security; or they shall be deemed to have waived their right to such lien.

271. The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried and determined by such action; and when a sale of the premises is necessary, the title shall be ascertained by proof to the satisfaction of the Court, before the judgment of sale shall be made; and where service of the complaint has been made by publication, like proof shall be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown parties having an interest in the property, their rights may be considered together in the action, and not as between themselves.

272. The plaintiff shall produce to the Court, on the hearing of the case, the certificate of the Recorder of the county where the property is situated, showing whether there were or not any liens outstanding of record upon the property, or any part thereof, at the time of the commencement of the action.

273. If it appear by the certificate of the Recorder that there were outstanding liens of record at the time of the commencement of the action, and the persons holding or claiming such liens are not made parties to the action, the Court shall either order such parties to be brought in by an amendment, or supplemental complaint, or appoint a referee to ascertain whether their liens have been paid; or if not paid, what amount remains due, and their order among the liens held by the parties who have appeared and answered; and whether the amount remaining due thereon has been secured in any way, and if secured, the extent and nature of the security.

274. The plaintiff shall cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed, as provided in the last Section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise of the true amount due, or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the Court, in such manner as may be proper. The report of the referee thereon shall be made to the Court, and shall be confirmed, modified, or

set aside, and a new reference ordered, as the justice of the case may require.

275. If it be alleged in the complaint, and be established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the Court that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the Court may order a sale thereof. Otherwise, upon the requisite proofs being made, it shall order a partition, according to the respective rights of the parties, as ascertained by the Court, and appoint three referees therefor; and shall designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

276. In making the partition, the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties, as determined by the Court, designating the several portions by proper landmarks; and may employ a Surveyor, with the necessary assistants, to aid them therein.

277. The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided, and the shares allotted to each party, with a particular description of each share.

278. The Court may confirm or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment shall be rendered that such partition be effectual forever; which judgment shall be binding and conclusive:

1st. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life, or for years; or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof after the termination of a particular estate therein; and who, by any contingency, may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life:

2d. On all persons interested in the property, who may be unknown, to whom notice shall have been given of the action for partition by publication; and,

3d. On all other persons claiming from such parties or persons, or either of them.

279. But such judgment and partition shall not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.

280. The expenses of the referees, including those of a Surveyor and his assistant, when employed, shall be ascertained and allowed by the Court; and the amount thereof, together with the fees allowed by law to the referees, shall be apportioned among the different parties to the action.

281. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien.

282. When a part of the property only is ordered to be sold, if there be an estate for life, or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

283. The proceeds of the sale of the incumbered property shall be applied under the direction of the Court as follows:

1st. To pay its just proportion of the general costs of the action:

2d. To pay the costs of the reference:

3d. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment:

4th. The residue among the owners of the property sold, according to their respective shares therein.

284. Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the Court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.

285. The proceeds of sale, and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the Court so directs. But in case no direction be given, all such proceeds and securities shall be paid into Court, or deposited therein, or as directed by the Court.

286. When the proceeds of sales of any shares or parcels belonging to persons who are parties to the action, and who are known, are paid into Court, the action may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the Court. Further testimony may be taken in Court, or by a referee, at the discretion of the Court, and the Court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

287. All sales of real property, made by referees under this chapter, shall be made by public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice shall state terms of sale, and if the property or any part of it is to be sold, subject to a prior estate, charge, or lien, that shall be stated in the notice.

288. The Court shall, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the State.

289‡. The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money, of such parts of the property as are directed by the Court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant in the name of the guardian of such infant; and for other shares in the name of the Clerk of the county and his successors in office.

290. The person entitled to a tenancy for life, or years, whose estate shall have been sold, shall be entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing filed with the Clerk of the Court. Upon the filing of such consent, the Clerk shall enter the same in the minutes of the Court.

291. If such consent be not given, filed and entered, as provided in the last Section, at or before a judgment of sale is rendered, the Court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate; and shall order the same to be paid to such party, or deposited in Court for him, as the case may require.

292. If the persons entitled to such estate for life or years be unknown, the Court shall provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

293. In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the Court shall ascertain and settle the proportional value of such contingent, or vested right or estate, and shall direct such proportion of the proceeds of the sale to be invested, secured or paid over, in such manner as to protect the rights and interests of the parties.

294. In all cases of sales of property, the terms shall be made known at the time; and if the premises consist of distinct farms or lots, they shall be sold separately.

295. Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase; nor shall a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this Section shall be void.

296. After completing a sale of the property, or any part thereof ordered to be sold, the referee shall report the same to the Court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions of the sale; and the securities, if any, taken. The report shall be filed in the office of the Clerk of the county where the property is situated.

297. If the sale be confirmed by the Court, an order shall be entered, directing the referees to execute conveyances and take securities pursuant to such sale; which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

298. When a party entitled to a share of the proporty, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

299. The conveyances shall be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the ac-

tion; and against all such parties and persons as were unknown, if the summons had been served by publication, and against all persons claiming from them, or either of them.

300. When there are proceeds of a sale belonging to an unknown owner, or to a person without the State, who has no legal representative within it, the same shall be invested in securities on interest, for the benefit of the persons entitled thereto.

301. When the security of the proceeds of the sale is taken, or when an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the Clerk of the county where the papers are filed, and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the Court.

302. When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their hands delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or when shares and proportions have been previously adjudged by the Court, such securities shall be taken in the names of, and payable to, the parties respectively entitled thereto; and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the Clerk.

303. The Clerk in whose name a security is taken, or by whom an investment is made, and his successors in office shall receive the interest and principal as it becomes due, and apply and invest the same as the Court may direct; and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose, in the Clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

304. When it appears that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered by judgment, the Court may adjudge compensation to be made by one party to another, on account of the inequality of partition. But such compensation shall not be required to be made to others, by owners unknown, nor by infants, unless, in case of an infant, it appear that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

305. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law, or directed by order of the Court.

306. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive, in behalf of such person, his share of the proceeds of such real property, from the referee, on executing with sufficient sureties, an undertaking approved by a Judge of the Court or by a County Judge, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative.

307. The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant, or other person entitled, and may execute a release in his behalf to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the Court.

308. The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, a litigation arises between some of the parties only, the Court may require the expense of such litigation to be paid by the parties thereto, or any of them.

309. The Court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee, when thus appointed, shall have the powers and perform all the duties required of the three referees.

CHAPTER V.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

310. An action may be brought by the Attorney General in the name of the people of this State, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State. And it shall be the duty of the Attorney General to bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed so to do by the Governor.

311. Whenever such action is brought, the Attorney General in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a Judge of the Supreme Court, or a District Judge, for the arrest of such defendant, and holding him to bail; and thereupon he may be arrested, and held to bail, in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

312. In every such case judgment may be rendered upon the right of the defendant, and also upon the right of the party, so alleged to be entitled; or only upon the right of the defendant as justice shall require.

313. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office.

314. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained, by reason of the usurpation of the office by the defendant.

315. When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

316. When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The Court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars; which fine, when collected, shall be paid into the Treasury of the State.

CHAPTER VI.

OF ACTIONS AGAINST STEAMERS, VESSELS, AND BOATS.

This Chapter, VI., does not apply to vessels trading from foreign ports to California. *Souter* vs. "*Sea Witch*," 1 Cal., 162; *Ray* vs. "*Harbeck*," 1 Cal., 451.

Admiralty jurisdiction must be received, pro tanto, in principle and forms, in State Courts.—*Averill* vs. "*Hartford*," 2 Cal., 308; *Taylor* vs. "*Columbia*," 5 Cal., 64.

For a full decision on points of jurisdiction, &c., of this Act, see *Thompson* vs. "*Julius D. Morton*," 23 Ohio, 26; 3 Livingston's Law Mag., 125.

317. All steamers, vessels and boats shall be liable:

1st. For supplies furnished for their use at the request of their respective owners, masters, agents, or consignees:

2d. For services rendered on board at the request of, or contract with, their respective owners, masters, agents, or consignees:

3d. For materials furnished in their construction, or repair, or equipment:

4th. For their wharfage and anchorage within the State:

5th. For non-performance or mal-performance of any contract for the transportation of persons or property, made by their respective owners, masters, agents, or consignees:

6th. For injuries committed by them to persons or property: Provided, that the wages of mariners, boatmen, and others employed in the service of such steamers, vessels, and boats, shall have preference over all other demands.

318. Actions for demands arising upon any of the grounds specified in the preceding Section, may be brought directly against such steamers, vessels, or boats.

319. The complaint shall designate the steamer, vessel, or boat by name, and shall be verified by the oath of the plaintiff, or some one in his behalf.

320. The summons attached to a certified copy of the complaint, may be served on the master, mate, or any person having charge of the steamer, vessel, or boat, against which the action is brought.

321. The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the steamer, vessel, or boat, against which the action is brought, with its tackle, apparel, and furniture attached, as security for the satisfaction of any judgment that may be recovered therein.

322. The Clerk of the Court shall issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect, that if judgment be rendered in favor of the steamer, vessel, or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages which may be sustained by such steamer, vessel or boat, from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars when the attachment is issued against a steamer or vessel, or less than two hundred dollars when issued against a boat. The undertaking shall be accompanied by an affidavit of each of the sureties, that he is a resident and freeholder or householder of the county, and worth double the amount specified in the undertaking, over and above all his just debts and liabilities. The Clerk shall file the undertaking and affidavits.

323. The writ shall be directed to the Sheriff of the county within which the steamer, vessel, or boat lies, and direct him to attach such steamer, vessel, or boat with its tackle, apparel, and furniture and keep the same in his custody until discharged by due course of law; unless the owner, master, agent, or consignee thereof, give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the demand in suit, which shall be specified in the writ, besides costs; in which case, to take such undertaking.

If the attachment was void, no proceedings can be had on the release bond.—*McQueen* vs. "*Russell*," 1 Cal., 165.

324. The Sheriff to whom the writ is directed and delivered shall execute the same without delay, and shall, unless the undertaking mentioned in the last Section be given, attach and keep in his custody the steamer, vessel or boat named therein, with its tackle, apparel and furniture, until

discharged by due course of law; but the Sheriff shall not be authorised by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel, or boat, nor with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook, or other persons employed on board.

325. The owner, master, agent, or consignee of the steamer, vessel, or boat, against which the action is brought, may appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on the behalf of the plaintiff, and may require sureties to justify, as in actions against individuals upon bail on arrest.

326. All proceedings in actions under the provisions of this chapter shall be conducted in the same manner as in actions against individuals, except as otherwise herein provided: and in all proceedings subsequent to the complaint, the steamer, vessel, or boat may be designated as defendant.

327. After the appearance to the action, of the owner, master, agent, or consignee, the attachment may, on motion, be discharged, in the same manner, and on like terms and conditions, as attachments in other cases, subject to the provisions of Section three hundred and twenty-nine.

328. If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the Sheriff shall sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel, or boat, with its tackle, apparel and furniture, or such interest therein as may be necessary, and shall apply the proceeds of sale as follows:

1st. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel, or boat sold, to the payment of the amount of such wages, as specified in the execution:

2d. To the payment of the judgment and costs, including his fees, and,

3d. He shall pay any balance remaining to the owner, master, agent, or consignee, who may have appeared in the action; or if there be no appearance, then into Court, subject to the claim of any party or parties legally entitled thereto.

329. Any mariner, boatman, or other person employed in the service of the steamer, vessel, or boat attached, who may wish to assert his claim

for wages against the same, the attachments being issued for other demands than such wages, shall file an affidavit of his claim, setting forth the amount and the particular service rendered, with the Clerk of the Court; and thereafter no attachment shall be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined as provided in the next Section, be covered thereby in addition to the other requirements; and any execution issued against such steamer, vessel, or boat, upon judgment recovered thereafter, shall direct the application of the proceeds of any sale: first, to the payment of the amount of such claims filed, or the amount determined, as provided in the next Section, which the Clerk shall insert in the writ; and second, to the payment of the judgment and costs, and Sheriff's fees; and shall direct the payment of any balance to the owner, master, agent, or consignee who may have appeared in the action; but if no appearance by them be made therein, it shall direct a deposit of the balance in Court.

330. If the claim of the mariner, boatman, or other person, filed with the Clerk of the Court, as provided in the last Section, be not contested within five days after notice of the filing thereof, by the owner, master, agent, or consignee of the steamer, vessel or boat against which the claim is filed, it shall be deemed admitted; but if contested, the Clerk shall endorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest, and shall immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the Clerk, or referee, may be received by the County Judge either in term or vacation, immediately after the same is given, and the judgment of the County Judge shall be final. On the review, the County Judge may use the minutes of the proofs taken by the Clerk, or referee, or may take the proofs anew.

331. The notice of sale published by the Sheriff, shall contain a statement of the measurement and tonnage of the steamer, vessel, or boat, and a general description of her condition.

332. From orders and judgments under this chapter, an appeal may be taken by the owner, master, agent, or consignee, on the same terms and conditions as appeals in actions against individuals.

TITLE IX.

OF APPEALS IN CIVIL ACTIONS.

CHAPTER I.

APPEALS IN GENERAL.

333‡. A judgment or order in a civil action, except when expressly made final by this Act, may be reviewed as prescribed by this title, and not otherwise.

See Sec. 332.

An appeal cannot be taken from a mere decision on demurrer, before final judgment. —*McGeough* vs. *Vanderwort*, 6 Cal., Jan'y T.; *Moraga* vs. *Emeric*, 4 Cal., 308.

On appeal where the record contains no proceedings except pleadings and judgment, which were sufficient, the Appellate Court will hold, that sufficient evidence was adduced to warrant the judgment.—*Ringgold* vs. *Haven*, 1 Cal., 108; *Gonzales* vs. *Huntley*, 1 Cal., 32; *Palmer* vs. *Brown*, ib., 42.

A decision sustaining or overruling a demurrer, may be appealed from, as an order, before judgment is entered, and that too, whether the demurrer goes to the whole or a part of the pleadings.—*Nolton* vs. *Western R. R. Co.*, 10 Pr. R.; 97; *Reynolds* vs. *Freeman*, 4 Sand., 702; contra, *Lewis* vs. *Acker*, 8 Pr., R., 414.

On an appeal from an order overruling a demurrer (not a judgment) the appeal operates per se as a stay of proceedings. No undertaking in such case is required.—*Cook* vs. *Pomeroy*, 10 Pr. R., 103.

An appeal lies from an order on demurrer, where a substantial right is effected.—*Burgoyne* vs. *Perry*, 3 Cal., 50.

An appeal will not lie from an order of Court refusing to set aside an interlocutory judgment. It should be taken upon the previous order itself.—*Stearns* vs. *Marvin*, 3 Cal., 376; *Henly* vs. *Hastings*, ib. 341.

An appeal does not lie from an interlocutory order.—*People* vs. *Thurston*, 5 Cal., 72.

In the matter of license of ferries, an appeal can be had to the District Court from the Court of Sessions.—*Webb* vs. *Hanson*, 3 Cal., 65.

334. An order made out of Court, without notice to the adverse party, may be vacated or modified, without notice, by the Judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made.

335. Any party aggrieved may appeal in the cases prescribed in this title. The party appealing shall be known as the appellant, and the adverse party as the respondent.

The acceptance of costs on a motion is not waiving the right to an appeal.—*Tysen* vs. *Wells*, 1 Cal., 378.

An appeal cannot be prosecuted by a stranger to the record.—*Montgomery* vs. *Leavenworth*, 2 Cal., 57.

336‡. An appeal may be taken:

1st. From a final judgment in an action, or special proceeding, commenced in the Court in which the judgment is rendered, within one year after the rendition of judgment.

2d. From a judgment rendered on an appeal from an inferior Court, within ninety days after the rendition of the judgment.

3d. From an order granting a new trial; from an order refusing to change the place of trial of an action or proceeding, after a motion is made therefor, in the cases provided by law, or on the ground that the Judge is disqualified from hearing or trying the same; from an order granting or dissolving an injunction; and from any special order made after the final judgment, within sixty days after the order is made and entered in the minutes of the Court.

This Section shall not extend to appeals to the District Courts from orders or judgments of the Probate Courts, but shall extend to judgments rendered in the District Courts upon such appeals.

What is a *final*, and what an *interlocutory* order, considered.—*Loring* vs. *Illsley*, 1 Cal., 24.

If the appellants have been guilty of no laches in perfecting their appeal, the Court may enlarge the time for them to file their bond to entitle them to a stay of proceedings under the statute, and in the meantime order a stay of proceedings in the inferior Court until the extended period shall have expired; in such cases the Court may impose such terms as shall appear to be proper.—*Bradley, et al* vs. *Hall & Wightman*, 1 Cal., 199.

The Supreme Court has not power to relieve a party from an omission to appeal to the general term, from a judgment within the time prescribed by law—*Humphrey* vs. *Chamberlain*, 1 Kern., 274.

337. The appeal shall be made by filing with the Clerk of the Court, with whom the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney.

338. When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, prepare such statement, which shall contain the grounds on which he intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more; and shall serve a copy thereof upon the adverse party. The respondent may, within five days thereafter, prepare amendments to the statement, and serve a copy on the appellant. If such amendments are admitted, the statement shall be corrected accordingly; and if not admitted, the statement and amendments shall be presented to the Judge who tried or heard the case, upon notice of two days

to the respondent, and a true statement shall thereupon be settled by such Judge.

See statement on motion for new trial, Sec. 195.

339¶. If the party shall omit to make a statement within the time above limited, he shall be deemed to have waived his right thereto; and when a statement is made, and the parties shall omit within the several times above limited, the one party to propose amendments, the other to notify an appearance before the Judge, they shall respectively be deemed, the former to have agreed to the statement as proposed, and the latter to have agreed to the amendments as proposed. And no settlement of the statement, or certificate thereto by the Judge, shall be required.

If the appellant allow the time to expire after taking the appeal, without framing a case, he waives his right to have a case stated; and a subsequent order of the Court, made without notice to the respondent, allowing further time to make up the statement, is a nullity.—*Leech* vs. *West*, 2 Cal., 95.

340. The several periods of time above limited may be enlarged, upon good cause shown, by the Judge before whom the cause was tried.

341. The statement, when settled by the Judge, shall be signed by him, with his certificate that the same has been allowed and is correct; when the statement is agreed upon by the parties, they or their attorneys shall sign the same with their certificate that it has been agreed upon by them, and is correct. In either case, when settled or agreed upon, it shall be filed with the Clerk.

342. The Clerk shall annex the statement, if the appeal be from a final judgment, to the judgment roll; if the appeal be from an order, to such order, or to a copy thereof.

343‡. The provisions of the last five preceding Sections shall not apply to appeals taken from an order made upon affidavit filed; but such affidavit shall be annexed to the order in the place of the statement mentioned in those Sections.

344. Upon an appeal from a judgment, the Court may review any intermediate order involving the merits, and necessarily affecting the judgment.

An appeal lies from an order on demurrer, where a substantial right is affected.—*Burgoyne* vs. *Perry*, 3 Cal., 50.

An order denying a motion to stay the trial of a cause until the decision of another cause, is not an order involving the merits, and is not reversable on the appeal from the final judgment.—*James* vs. *Chalmers*, 2 Seld., 209.

345. Upon an appeal from a judgment or order, the Appellate Court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties; and may set aside or confirm, or modify any or all of the proceedings subsequent to or dependent upon such judgment or order, and may, if necessary or proper, order a new trial. When the judgment or order is reversed or modified, the Appellate Court may make complete restitution of all property and rights lost by the erroneous judgment or order, and when it appears to the Appellate Court that the appeal was made for delay, it may add to the costs such damages as may be just.

When it is proper, this Court will render such judgment as the Court below should have rendered.—*Bidleman* vs. *Kewen*, 2 Cal., 248.

A judgment cannot be affirmed as to a part of the amount recovered, and reversed as to the residue, where a new trial is ordered as to the part which is reversed.—*Story* vs. *N. Y. and Harlem R. R. Co.*, 2 Seld., 86.

Where a judgment entered at special term is appealed to the general term, and is there affirmed, a new judgment should not be entered.—*DeAgreda* vs. *Mantel*, 1 Abbott, 130.

Upon appeal to the general term, the judgment may be reversed as to one defendant who appeals, without affecting the judgment as to another defendant who does not appeal, in cases where a several judgment below would be proper.—*Farrell* vs. *Calkins*, 10 Barb. 348; *Geraud* vs. *Stagg*, 10 Pr. R., 369.

346‡. On appeal from a final judgment, the appellant shall furnish the Court with a copy of the notice of appeal, the judgment roll and the statement annexed, (if there be one,) certified by the Clerk to be a correct copy. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the Court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used in the hearing of the Court below; such copies to be certified by the Clerk to be correct. If any written opinion be placed on file on rendering the judgment or making the order in the Court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed.

The time to appeal runs from the making of the final order or judgment appealed from, and not from the time of docketing the judgment roll.—*Bank of Geneva* vs. *Hotchkiss*, 1 Code Rep., N. S., 153; 5 Pr. R., 478; *Woolen Manuf. Co.*, vs. *Townsend*, 1 Code Rep., N. S., 415.

Where the respondents obtained a judgment on the 23d of December and the appeal bond was filed on the 24th of December and certificate of the Clerk of the same Court, dated February 2d, 1852, that no transcript, record, or other papers in the cause had been filed; and the affidavit of respondents was produced that the appeal was taken for delay; the Court ordered the appeal to be dismissed, with ten per cent. damages and costs.—*Buckley* vs. *Morse*, 2 Cal., 149.

Where an appellant has failed to file a transcript of the record, showing that the appeal had been perfected, the Court ordered it dismissed, with ten per cent. costs.—*Pacheco* vs. *Bemal*, 2 Cal., 150.

An appeal, which had been dismissed for failure to file the transcript in time, was reinstated upon cause shown.—*Stark* vs. *Barnes*, 2 Cal., 162.

CHAPTER II.

APPEALS TO THE SUPREME COURT FROM THE DISTRICT COURTS, AND THE SUPERIOR COURT OF THE CITY OF SAN FRANCISCO.

347‡. An appeal may be taken to the Supreme Court from the District Courts and the Superior Court of the City of San Francisco in the following cases:

1st. From a final judgment rendered in an action or special proceeding commenced in those Courts, or brought into those Courts from another Court.

2d. From an order granting or refusing a new trial; from an order refusing to change the place of trial of an action or proceeding after a motion is made therefor, in the cases provided by law, or on the ground that a Judge is disqualified from hearing or trying the same; from an order granting or dissolving an injunction; and from any special order made after final judgment.

The Supreme Court, in Chancery cases, has full power and jurisdiction on appeal for the purpose of equity, to correct the errors of the Court below, in whatever shape, or by whatever party the appeal is taken up.—*Grayson* vs. *Guild*, 4 Cal., 122.

An appeal may be taken from a judgment of the District Court, without moving for a new trial in that Court.—*Innis* vs. *Steamer* "*Senator*," 1 Cal., 459.

No appeal lies from the judgment of a District Court on an appeal from an order from the Court of Sessions, upon an application for a ferry license.—*Webb* vs. *Hanson*, 2 Cal., 133.

Appeal dismissed, where the record disclosed that the Court below might or might not have granted a new trial, without impeachment of its legal discretion.—*Cook* vs. *Stewart*, 2 Cal., 348.

Though the plaintiff recover less than two hundred dollars, the defendant is entitled to an appeal, if the costs added to the judgment exceed two hundred dollars.—*Gordon* vs. *Ross*, 2 Cal., 156.

Ten per cent. damages was awarded by the Supreme Court, when the appeal was for delay.—*Russell* vs. *Williams*, 2 Cal., 158.

The Appellate Court will presume in favor of the judgment below, unless the record clearly shows error.—*Thompson* vs. *Monroe*, 2 Cal., 99; *Balfour* vs. *Mitchell*, 12 Sme & M., 629; *Kilburn* vs. *Richie*, 2 Cal., 145.

A judgment will not be reversed for an error by which the rights of the parties were not prejudiced.—*Kilburn* vs. *Richie*, 2 Cal., 145.

See Rules of Supreme Court, in the APPENDIX.

348. To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the Clerk with

whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such deposit made with the Clerk within five days after the notice of appeal is filed.

If an appeal be dismissed for want of a proper bond, the party can appeal again, within statute time.—*Martinez* vs. *Gallardo*, 5 Cal., 21.

Proceedings stayed upon a judgment, pending an appeal, though no undertaking was given.—*Ross* vs. *Austill*, 2 Cal., 183.

If the undertaking substantially complies with the statute, and secures to the respondent all the law designed for him, it is sufficient.—*Coleman Rowe*, 4 Sme. & M., 747; *Smith* vs. *Norval*, 2 Code Rep., 14.

349. If the appeal be from a judgment or order directing the payment of money, it shall not stay the execution of the judgment or order unless a written undertaking be executed on the part of the appellant by two or more sureties, stating their places of residence and occupation, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof be affirmed, the appellant shall pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment order shall be affirmed, if affirmed only in part; and all damages and costs which shall be awarded against the appellant, upon the appeal.

A judgment directing the satisfaction of money out of a fund in Court, is not a judgment directing the payment of money, within this Section.—*Curtis* vs. *Leavitt*, 1 Abbott, 274; 10 Pr. R., 481.

350. If the judgment or order appealed from direct the assignment or delivery of documents, or personal property, the execution of the judgment or order shall not be stayed by appeal, unless the things required to be assigned or delivered, be placed in the custody of such officer or receiver as the Court may appoint; or unless an undertaking be entered into, on the part of the appellant, with at least two sureties, and in such amount as the Court or the Judge thereof, or County Judge may direct, to the effect that the appellant will obey the order of the appellate Court upon the appeal.

351. If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order shall not be stayed by the appeal, until the instrument is executed and deposited with the Clerk, with whom the judgment or order is entered, to abide the judgment of the Appellate Court.

352. If the judgment or order appealed from direct the sale, or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of

such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the Judge of the Court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment for a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

353. Whenever an appeal is perfected, as provided by the preceding Sections in this chapter, it shall stay all further proceedings in the Court below, upon the judgment or order appealed from, or upon matter embraced therein; but the Court below may proceed upon any other matter included in the action, and not affected by the judgment or order appealed from. And the Court below may, in its discretion, dispense with, or limit the security required by said Sections, when the appellant is an executor, administrator, trustee, or other person acting in another's right.

354. The undertaking prescribed by Sections three hundred and forty-eight, three hundred and forty-nine, three hundred and fifty, and three hundred and fifty-two, may be in one instrument, or several, at the option of the appellant.

355‡. An undertaking upon an appeal shall be of no effect unless it be accompanied by the affidavit of the sureties, that they are each worth the amount specified therein over and above all their just debts and liabilities, exclusive of the property exempt from execution, except where the judgment exceeds three thousand dollars, and the undertaking on appeal is executed by more than two sureties, they may state on their affidavit that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties. The adverse party may, however, except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before a Judge of the Court below, or a County Judge, or the County Clerk, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal shall be regarded as if no such undertaking had been given, and in all cases where an undertaking is required on appeal by the provisions of this chapter, a deposit in the Court below of the amount of the judgment appealed from and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

That the undertaking be approved, is an important feature in perfecting an appeal. —*Wade* vs. *Amer. Col. Soc.*, 4 Sme & M., 670.

The exception should be to "sureties," and not to the undertaking.—*Young* vs. *Colby*, 2 Code Rep., 68.

On an application for justification of sureties on an appeal, the merits of the appeal will not be considered.—*Bradley* vs. *Hall*, 1 Cal., 199.

The sureties need only justify to double the amount of the judgment.—*Rich* vs. *Beekman*, 2 Code Rep., 63.

356. In cases not provided for in Sections 349, 350, 351, and 353, the perfecting of an appeal, by giving the undertaking, and the justification of the sureties thereon, if required, or making the deposit mentioned in Section 348, shall stay proceedings in the Court below upon the judgment or order appealed from; except that where it directs the sale of perishable property, the Court below may order the property to be sold, and the proceeds thereof to be deposited, to abide the judgment of the appellate Court.

357‡. Appeals in the Supreme Court may be brought to a hearing by either party, upon a notice of three days to the opposite party. Before the argument each party shall furnish to the other and to each of the Justices a copy of his points and authorities, or either party may file one copy thereof with the Clerk, who shall cause the requisite copies to be made.

When appellant notices case for argument, respondent may affirm the judgment, ex parte, although he gave no notice.—*Constant* vs. *Ward*, 1 Cal., 333.

See Rule XIV. and Sqq.

358. When judgment is rendered upon the appeal, it shall be certified by the Clerk of the Supreme Court to the Clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the Clerk with whom the roll is filed shall attach the certificate to the judgment roll, and enter a minute of the judgment of the Supreme Court on the docket against the original entry. In cases of an appeal from the order, the Clerk shall enter at length in the records of the Court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified, as the case may be, by the Supreme Court, on appeal.

See Section 665.

Where a remittitur is sent down, the Clerk of the District Court may issue execution for costs.—"*Marysville*" vs. *Buchanan*, 3 Cal., 212.

By rule of this Court, no mandate or remittitur is allowed to issue to the Court below before the expiration of ten days from the date of the judgment; after the expiration of that time, the Court loses all control over the subject, particularly if the Court has adjourned.—*Haight* vs. *Cary*, 5 Cal., 65.

CHAPTER III.

APPEALS TO THE DISTRICT [SUPREME] COURTS FROM THE COUNTY COURTS.

The appellate jurisdiction of District Courts held unconstitutional.—*Reed* vs. *McCormick*, 4 Cal., 342; *People* vs. *Peralta*, 3 Cal., 379; *Caulfield* vs. *Hudson*, 3 Cal., 389; *Hernandez* vs. *Simon*. 3 Cal., 464; *Brooks* vs. *Townsend*, 5 Cal., 13.

No appeal lies from the judgment of a District Court on an appeal from an order from the Court of Sessions, upon an application for a ferry license.—*Webb* vs. *Hanson*, 2 Cal., 133.

359‡. An appeal may be taken to the Supreme Court from a judgment of the County Court, in all cases where the amount in dispute exceeds two hundred dollars, or where the legality of any tax, toll or impost, or municipal fine, is in question.

Though the plaintiff recover less than two hundred dollars, the defendant is entitled to an appeal, if the costs added to the judgment exceed two hundred dollars.—*Gordon* vs. *Ross*, 2 Cal., 156.

360‡. Security shall be given upon such appeal in the same manner and to the same extent as upon an appeal to the Supreme Court from the District Court, and like justification on the part of the sureties may be required.

361‡. Appeals from the County Courts shall be brought to a hearing in the same manner, and upon like notice, as appeals from the District Court.

362‡. The appellant shall furnish the papers for the Supreme Court, in the same manner as upon appeals from the District Court.

CHAPTER IV.

APPEALS TO THE DISTRICT COURTS FROM THE PROBATE COURTS.

In the matter of license of ferries, an appeal can be had to the District Court from the Court of Sessions.—*Webb* vs. *Hanson*, 3 Cal., 65.

See Supreme Court Rules, L. to LIII.

363. An appeal may be taken from a Probate Court to the District Court of the district in which the Probate Court is held, in the following cases:

1st. From an order or decree admitting a will to probate, or refusing the same:

2d. From an order setting apart property, or making an allowance for the widow or children:

3d. From an order granting letters testamentary or of administration, or appointing a guardian of an infant, or of an insane person, or of a person incompetent to manage his property, or refusing to grant such letters, or to make such appointment, or making such letters or appointment:

4th. From an order directing the sale or conveyance of real property:

5th. From an order or decree by which a debt, claim, legacy, or distributive share is allowed, or payment thereof directed; or by which such allowance or direction is refused:

6th. From an order made on the settlement of an executor, administrator or guardian.

364. The appeal shall be taken within thirty days after the order or decree appealed from is entered with the Clerk.

365‡. Appeals from the Probate Court shall be brought to a hearing at the earliest period practicable. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the District Court may order the appeal dismissed.

CHAPTER V.

APPEALS TO THE COUNTY COURTS FROM JUSTICE'S AND RECORDER'S COURTS.

366‡. Judgment in all civil cases rendered by Justice's, Recorder's and Mayor's Courts, may be renewed by the County Court; when the appeal is taken on questions of law alone, it shall be heard on a statement of the case prepared as prescribed in Title XVI of this Act. When the appeal is taken on questions of fact, or on questions of both law and fact, the action shall be tried anew in the County Court, and either party may, on such trial, demand a Jury.

The County Court has no jurisdiction to enforce a mechanic's lien, where the amount in controversy exceeds two hundred dollars.—*Brock* vs. *Herrick*, 5 Cal., 63.

The trial on appeal in County Courts must be de novo, and the judgment of the Justice's Court cannot be reversed for error.—*Coyle* vs. *Baldwin*, 5 Cal., 13.

The County Court, where an appeal bond is defective, should give leave to file a good bond.—*Billings* vs. *Roadhouse*, 5 Cal., 15.

Where both parties appear, no notice of appeal is necessary to be shown.—*McLaren* vs. *Shartzer*, 5 Cal., 15.

In an appeal notice, the words "whole judgment," is sufficiently definite.—*Price* vs. *Van Cannegham*, 5 Cal., 19.

367½. Upon an appeal heard upon a statement of the case, the County Court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to, and dependent upon, said judgment; and may if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial shall be conducted in all respects, as trials in the District Court. The provisions of this Act, as to changing the place of trial, and all the provisions as to trials in the District Court, shall be applicable to trials on appeal in the County Court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the County Court, after notice, may order the appeal to be dismissed. Judgments rendered in the County Court on appeal, shall have the same force and effect, and be enforced in the same manner as judgments in actions commenced in the District Court.

TITLE X.

MISCELLANEOUS PROCEEDINGS.

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

368. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding, as provided in Section thirty-two, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons.

A covenant not to sue made to a portion only of joint debtors, does not release any of them.—*Matthey* vs. *Gally*, 4 Cal., 62.

In such a proceeding does the cause of action or right to proceed, arise upon judgment or the original demand.—*Oakley* vs. *Aspinwall*, 4 Coms., 513.

In a suit against partners, judgment can be taken only against those served with process.

When some of the defendants are not served with process, the plaintiff may proceed against those served.—*Ingraham* vs. *Gildemeester*, 2 Cal., 88.

See Sec. 32.

369. The summons as provided in the last Section, shall describe the judgment, and require the person summoned to show cause why he should not be bound by it, and shall be served in the same manner, and returnable within the same time, as the original summons. It shall not be necessary to file a new complaint.

370. The summons shall be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and shall specify the amount due thereon.

371. Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitation.

372. If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, shall constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, shall constitute such written allegations.

373. The issues formed may be tried in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it shall be for the amount remaining unsatisfied on such original judgment, with interest thereon.

CHAPTER II.

CONFESSION OF JUDGMENT WITHOUT ACTION.

374. A judgment by confession may be entered without action, either for money due, or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

A judgment confessed by one partner, in the name of himself and his copartner, is void as to his copartner.—*Morgan* vs. *Richardson*, 16 Mo. R., 409; *Stoutenberg* vs. *Vandenberg*, 7 Pr. R., 229.

375. A statement in writing shall be made, signed by the defendant, and verified by his oath to the following effect:

1st. It shall authorize the entry of judgment for a specified sum.

2d. If it be for money due, or to become due, it shall state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due, or to become due.

3d. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and shall show that the sum confessed therefor does not exceed the same.

376. The statement shall be filed with the Clerk of the county in which the judgment is to be entered, who shall endorse upon it, and enter in the judgment book a judgment of such Court, for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment endorsed, shall thereupon become the judgment roll.

The Court will not allow a party to suffer by the omission or mistake of a clerk, attorney or officer of the Court, where a substantial right is involved, on a confession of judgment.—*Neele* vs. *Berryhill*, *Clark* vs. *same*, *Gibbs* vs. *same*, 4 Pr. R., 16; contra *Manning* vs. *Guyon*, 1 Code, Rep. 43; *Allen* vs. *Smilie*, 1 Abbott, 358.

CHAPTER III.

SUBMITTTING A CONTROVERSY WITHOUT ACTION.

377. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any Court which should have jurisdiction, if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The Court shall thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

It is a general rule that the Court will not entertain a fictitious case, to test a right to a particular thing.—*Port Gibson Bank* vs. *Dickson*, 4 Sme. & M., 689; *Brewington* vs. *Lowe*, 1 Ind. (Carter,) R., 21.

378. Judgment shall be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll.

379. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be in the same manner subject to appeal.

CHAPTER IV.

OF ARBITRATIONS.

380. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification shall not include questions relating merely to the partition or boundaries of real property.

Held, that a reference may be an arbitration, and the report thereon an award.—*Blunt* vs. *Whitney*, 3 Sand., 4.

One partner cannot bind his copartner by a submission of partnership matters to arbitration.—*Jones* vs. *Gilbert*, 5 Cal., 43.

381. The submission to arbitration shall be in writing, and may be to one or more persons.

See Sec. 529.

Submission to arbitration discontinues a suit. A consent to submit to arbitration does not authorize an entry of judgment.—*Gunter* vs. *Sanchez*, 1 Cal., 45.

382. It may be stipulated in the submission, that it be entered as an order of the County Court, or of the District Court, for which purpose it shall be filed with the Clerk of the County where the parties, or one of them, reside. The Clerk shall, thereupon, enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award shall be made. When so entered, the submission shall not be revoked without the consent of both parties. The arbitrators may be compelled by the Court to make an award, and the award may be enforced by the Court, in the same manner as a judgment. If the submission be not made an order of the Court, it may be revoked at any time before the award is made.

383. Arbitrators shall have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

Arbitrators are not bound to decide according to law.—*Muldrow* vs. *Norris*, 2 Cal., 74; *Peachy* vs. *Ritchie*, 4 Cal., 205.

384. All the arbitrators shall meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they shall be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties, in relation to the matters in controversy, and to make a just award, according to their understanding.

385. The award shall be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the Court, the award shall be filed with the Clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award shall be entered by the Clerk in the judgment book, and shall thereupon have the effect of a judgment.

Where the arbitration is to end litigation, and becomes uncertain and incomplete, it must be set aside.—*Pierson* vs. *Norman*, 2 Cal., 599.

The statute must be pursued in the manner in which the submission is filed with the Clerk, and the motion made for judgment on the award.—*Heslep* vs. *San Francisco*, 4 Cal., 1.

An award rendered upon a fair arbitration and concurred in, is conclusive.—*Tuolumne Water Co.*, vs. *Jarvis*, 5 Cal., 29.

386. The Court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1st. That it was procured by corruption or fraud:

2d. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced:

3d. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

387. The Court may, on motion, modify or correct the award where it appears:

1st. That there was a miscalculation in figures, upon which it was made, or that there is a mistake in the description of some person or property therein:

2d. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matter submitted:

3d. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

Awards must be set aside for fraud, mistake or accident. An award may be enforced for the good part, and set aside for the bad.—*Muldrow* vs. *Norris*, 2 Cal., 74.

388. The decision upon the motion shall be subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion is made, shall not be subject to appeal.

A stipulation that neither party will appeal, is not binding.—*Muldrow* vs. *Norris*, 2 Cal., 74.

398. If a submission to arbitration be revoked, and action be brought therefor, the amount to be recovered shall only be the costs and damages sustained in preparing for and attending the arbitration.

CHAPTER V.

OFFER OF THE DEFENDANT TO COMPROMISE THE WHOLE OR A PART OF AN ACTION.

390. The defendant, may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him, for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the Clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer shall be deemed withdrawn, and shall not be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he shall not recover costs, but shall pay the defendant's costs, from the time of the offer.

The offer, under the Code, is analogous to the cognovit under the former practice.—*Johnson* vs. *Sagar*, 10 Pr. R., 453; *Lippman* vs. *Joelson*, 1 Code Rep., N. S., note, 161; *Emery* vs. *Emery*, 9 Pr. R., 130.

That the defendant offered to let the plaintiff take judgment for a sum admitted in the answer to be due, which offer plaintiff declined, is no reason for denying plaintiff's motion, that defendant pay into the Court the sum admitted to be due.—*Duisenberry* vs. *Woodward*, 1 Abbott, 448.

TITLE XI.

OF WITNESSES, AND OF THE MANNER OF OBTAINING EVIDENCE.

CHAPTER I.

OF WITNESSES.

391. All persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding.

A bookkeeper, as a witness, has a right to refer to the books kept by him, to refresh his memory.—*Treadwell* vs. *Wells*, 4 Cal., 260.

The Court should decide upon the admissibility of a witness, and not refer the question to the jury.—*Tabor* vs. *Staniels*, 2 Cal., 240.

392‡. No person offered as a witness shall be excluded on account of his opinions on matters of religious belief; nor shall any person be excluded on account of his interest in the event of the action or proceedings, except in the following cases:

1st. When he is a party to the action or proceeding, or the action or proceeding is prosecuted or defended for his immediate benefit.

2d. When his interest is a present, certain, and vested interest.

Under the statute, a witness is not excluded on the ground of interest.—*Johnson* vs. *Carry*, 2 Cal., 33.

The indorser of a note is not a party; he may be a witness.—*Tomlinson* vs. *Spenser*, 5 Cal., 39.

An agent may be a witness as to his authority.—Ib.

Sections 392 and 393 exclude all testimony, when the witness would be benefitted by it.—*Jones* vs. *Post*, 4 Cal., 14; *Griffin* vs. *Alsop*, ib., 406.

A broker cannot be a witness if his commission depends on the result.—*Shaw* vs. *Davis*, 5 Cal., 87.

Where a witness is examined on his voir dire, as to his interest, the party offering him, may cross-examine him.—*Beach* vs. *Covillaud*, 2 Cal., 237.

A witness may be examined as to whether he belongs to a secret society, with a view to show that the principles and objects of such society are such that his testimony is liable to suspicion of unfairness.—*People* vs. *Christie*, 2 Abbott, 256; *People* vs. *Reyes & Valencia*, 5 Cal., 61.

393‡. The true test of the interest of a person, which shall render him incompetent as a witness, shall be that he will gain or lose by the direct legal operation and effect of the judgment, or that the record of the judgment will be legal evidence for or against him, in some other action; but

nothing in this, or in the last Section, shall prevent a party calling as a witness the adverse party to the action, or a person whose interest is adverse, nor a party being a witness in the cases mentioned in Section four hundred and twenty-three.

394. The following persons shall not be witnesses:

1st. Those who are of unsound mind at the time of their production for examination.

2d. Children under ten years of age, who, in the opinion of the Court, appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

3d. Indians, or persons having one-half or more of indian blood, and negroes, or persons having one-half or more of negro blood, in an action or proceeding to which a white person is a party.

4th. Persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the Governor, or such judgment has been reversed on appeal.

3d. Held to apply to Chinese.—*People* vs. *Hall*, 4 Cal., 399.

395. A husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. But this exception shall not apply to an action or proceeding by one against the other.

396. An attorney or counsellor, shall not, without the consent of his client, be examined as a witness as [to] any communication made by the client to him, or his advice given thereon, in the course of professional employment.

Landsberger vs. *Gorham*, 5 Cal., 68.

397. A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

398. A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

399. A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

400. The Judge himself or any juror, may be called as a witness by either party; but in such case it shall be in the discretion of the Court or Judge to order the trial to be postponed or suspended, and to take place before another Judge or jury.

401. When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him.

CHAPTER II.

MANNER OF COMPELLING THE ATTENDANCE OF WITNESSES, AND THEIR RIGHTS AND DUTIES.

402¶. A subpœna may require, not only the personal attendance of the person to whom it is directed at a particular time and place, to testify as a witness, but may also require him to bring him any books, documents, or other things under his control, to be used in evidence. No person shall be required to attend as a witness before any Court, Judge, Justice, or any other officer out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

403. The subpœna shall be issued as follows:

1st. To require attendance before a Court, or at the trial of an issue therein, it shall be issued in the name and under the seal of the Court before which the attendance is required, or in which the issue is pending:

2d. To require attendance out of Court before a Judge, Justice, or other officer authorised to administer oaths, or take testimony in any matter, under the laws of this State; it shall be issued by the Judge, Justice, or other officer before whom the attendance is required:

3d. To require attendance before a Commissioner appointed to take testimony by a Court of any other State or county, it may be issued by any Judge or Justice of the Peace, in places within their respective jurisdictions.

404. The service of a subpœna shall be made by showing the original,

and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. Such service may be made by any person.

405. If a witness be concealed in a building or vessel so as to prevent the service of a subpœna upon him, any Court or Judge, or any officer issuing the subpœna, may, upon proof by affidavit of the concealment and of the materiality of the witness, make an order that the Sheriff of the county serve the subpœna; and the Sheriff shall serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

406. A person present in Court, or before a judicial officer, may be required to testify, in the same manner as if he were in attendance upon a subpœna issued by such Court or officer.

407. It shall be the duty of a witness, duly served with a subpœna, to attend at the time appointed, with any papers under his control required by the subpœna, to answer all pertinent and legal questions; and, unless sooner discharged, to remain till the testimony is closed.

408. A witness shall answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact at issue would be presumed. But a witness shall answer as to the fact of his previous conviction for felony.

409. Disobedience to a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the Court, or officer issuing the subpœna, or requiring the witness to be sworn; and if the witness be a party his complaint may be dismissed or his answer stricken out.

410. A witness disobeying a subpœna shall also forfeit to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend; which forfeiture and damages may be recovered in a civil action.

411. In case of failure of a witness to attend, the Court or officer

issuing the subpœna, upon proof of the service thereof and of the failure of the witness, may issue a warrant to the Sheriff of the county to arrest the witness and bring him before the Court or officer where his attendance was required.

412. If the witness be a prisoner, confined in a jail or prison within this State for any other cause than a sentence for felony, an order for his examination in the prison upon deposition, or for his temporary removal and production before a Court or officer for the purpose of being orally examined, may be made as follows:

1st. By the Court itself, in which the action or special proceeding is pending:

2d. By a Judge of the Supreme Court, District Court, or County Judge of the county where the action or proceeding is pending, if before a Judge or other person out of Court.

413. Such an order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

414. If the witness be imprisoned in the county where the action or proceeding is pending, and for a cause other than a sentence for felony, his production may be required. In all other cases, his examination, when allowed, shall be taken upon deposition.

415. Every person who has been in good faith, served with a subpœna to attend as a witness before a Court, Judge, Commissioner, Referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, shall be exonerated from arrest, in a civil action, while going to the place of attendance, necessarily remaining there, and returning therefrom.

416. The arrest of a witness contrary to the last Section shall be void; but an officer shall not be liable to the party for making the arrest in ignorance of the facts creating the exoneration, but shall be liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit, stating:

1st. That he has been served with a subpœna to attend as a witness before a Court, officer, or other person; specifying the same, the place of attendance, and the action or proceeding in which the subpœna was issued; and,

2d. That he has not been thus served by his own procurement, with the intention of avoiding an arrest:

3d. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpœna. The affidavit may be taken by the officer, and shall exonerate him from liability for discharging the witness when arrested.

CHAPTER III.

OF THE EXAMINATION OF PARTIES TO AN ACTION OR PROCEEDING, AND OF PERSONS FOR WHOSE IMMEDIATE BENEFIT SUCH ACTION OR PROCEEDING IS PROSECUTED OR DEFENDED.

417. No action to obtain a discovery under oath, in aid of the prosecution or defence of another action or proceeding, shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

This Section does not apply to prevent an examination of a debtor in a proceeding supplementary to an execution.—*Dunham* vs. *Nicholson*, 2 Sand., 636; *Quick* vs. *Keeler*, ib., 231.

418. A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties; and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify at the trial, and he may be examined on a commission.

A party to a suit, who is made a witness by statute, is to become such under the the same requisitions and restrictions as any other witness.—*Arnold* vs. *Arnold*, 13 Verm., 370.

A co-defendant is not a competent witness where his testimony would enure to his own benefit. He could show his co-defendant was not his partner.—*Sparks* vs. *Kohler*, 3 Cal., 299; *Johnson* vs. *Henderson*, ib., 368; *Buckley* vs. *Manife*, ib., 441; *Hotaling* vs. *Cronise*, 2 Cal., 60; *Beach* vs. *Covillaud*, ib., 237.

A maker of a note cannot be a witness to charge his endorser. His interest is not equally balanced.—*Palmer* vs. *Tripps*, 6 Cal., Jan'y T.

The examination of a defendant not served with process, as a witness, will not authorise the examination of a plaintiff as a witness on behalf of himself and his co-plaintiffs. —*Robinson* vs. *Frost*, 14 Barb., 536.

In an action for a tort against two or more defendants, each defendant is a competent witness for his co-defendant.

As to what matters upon which he may give evidence, discussed.—*Beal* vs. *Finch*, 1 Kern., 128.

Under the Code a defendant cannot be examined by a co-defendant to establish usury as a defense to their joint promissory note.—*Ely* vs. *Miller*, 1 Abbott, 241.

419. The examination of a party, thus taken, may be rebutted by adverse testimony.

420. If a party refuse to attend and testify at the trial, or to give his deposition before trial, or upon a commission when required, his complaint, answer, or reply, may be stricken out, and judgment be taken against him; and he may be also, in the discretion of the Court, proceeded against as in other cases for a contempt.

421. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf in respect to any matter pertinent to the issue. But if he testify to any new matter not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answer thereto; or to discharge, when his answer would charge himself, such adverse party may offer himself as a witness on his own behalf in respect to such new matter, and shall be so received.

Where a party called, testifies to independent matter in his own behalf, the Court is not bound to believe him and decide according to his testimony.—*Roberts* vs. *Gee*, 15 Barb., 449.

The party so offering to be a witness for himself, must only explain the new matter, and no more.—*Dwinelle* vs. *Henriquez*, 1 Cal. 387.

Where a plaintiff calls the defendant as a witness to prove the plaintiff's claim, and the defendant on a cross examination in his own behalf proves a counter claim as set up in his answer, the plaintiff may be examined in reference to the evidence given by the defendant on the subject of the counter claim.—*Harpell* vs. *Irwin*, 1 Abbott, 144.

422. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination as if he were named as a party.

423‡. Parties may be witnesses on their own behalf when the action is brought for the settlement of, or in relation to, the business and accounts of a copartnership then existing or which had previously existed between them, to prove vouchers or items of account under one hundred dollars.

CHAPTER IV.

ON AFFIDAVITS.

424. An affidavit to be used before any Court, Judge, or officer of this State, may be taken before any Judge, or Clerk of any Court, or any Justice of the Peace, or Notary Public in this State.

Affidavits of the loss of an instrument, &c., to be used in Court, may be taken ex parte, without notice.—*McCann* vs. *Beach*, 2 Cal., 25.

425. An affidavit taken in another State of the United States, to be used in this State, shall be taken before a Commissioner appointed by the Governor of this State to take affidavits and depositions in such other State, or before any Judge of a Court of Record having a seal.

426. An affidavit taken in a foreign country to be used in this State, shall be taken before an Ambassador, Minister, or Consul of the United States, or before any Judge of a Court of Record having a seal in such foreign country.

427. When an affidavit is taken before a Judge of a Court in another State, or in a foreign country, the genuineness of the signature of the Judge, the existence of the Court, and the fact that such a Judge is a member thereof, shall be certified by the Clerk of the Court, under the seal thereof.

CHAPTER V.

OF DEPOSITIONS TAKEN IN THIS STATE.

428. The testimony of a witness in this State, may be taken by deposition in an action, at any time after the service of the summons or the appearance of the defendant; aud in a special proceeding, after a question of fact has arisen therein, in the following cases:

1st. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended.

2d. When the witness resides out of the county in which his testimony is to be used.

3d. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required.

4th. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

Depositions may be taken by Notaries Public, but only when the witness resides out of the county where the suit is pending, and a commission is regularly sued out and directed to the Notary.

The depositions of witnesses residing in the county where the suit is pending, can be taken only by a commissioner for such county.—*McCann* vs. *Beach*, 2 Cal., 25, 32.

Taking testimony by depositions, is in derogation of the common law, and must not only be done before the proper officer, but every requirement of the law must be complied with.—*McCann* vs. *Beach*, 2 Cal., 25; *Dwinelle* vs. *Howland*, 1 Abbott, 87; *Dye* vs. *Bailey*, 2 Cal., 383.

A motion at the trial to suppress the whole of a deposition, on the ground that some of the interrogatories and parts of the deposition are improper, should be denied.

If any part of the deposition is competent, the objection should be confined to that which is not so.—*The Commercial Bank of Pennsylvania* vs. *The Union Bank of New York*, 1 Kern., 203.

429. Either party may have the deposition taken of a witness in this State, before any Judge or Clerk, or any Justice of the Peace, or Notary Public in this State, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is one mentioned in the last Section. Such notice shall be at least five days, and in addition one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless for a cause shown, a Judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice.

430. Either party may attend such examination, and put such questions, direct and cross, as may be proper. The deposition, when completed, shall be carefully read to the witness, and corrected by him in any particular, if desired; it shall then be subscribed by the witness, certified by the Judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed, and directed to the Clerk of the Court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the Judge or officer to the Clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial, or other proceeding, against any party giving or receiving the notice, subject to all legal exceptions. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken by the reason of the absence or intended absence from the county, of the witness, or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial, that the witness continues absent or infirm, to the best of the deponent's knowledge or belief. The deposition thus taken may be also read in case of the death of the witness.

431. When a deposition has been once taken, it may be read in any stage of the same action or proceeding by either party, and shall then be deemed the evidence of the party reading it.

CHAPTER VI.

OF DEPOSITIONS TAKEN OUT OF THIS STATE.

432. The testimony of a witness out of the State may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, at any time after a question of fact has arisen therein.

Diligence must be exercised in applying for a commission.—*Pierson* vs. *Holbrook*, 2 Cal., 598.

The proper time to object to such deposition is when it is offered in evidence.—*Mills* vs. *Dunlap*, 3 Cal., 94.

It is also admissable, notwithstanding the witness may have returned to the State since his examination, if he is not within the State at the time of the trial.—*Markoe* vs. *Aldrich*, 1 Abbott, 55.

On the execution of a commission, the parties have a right to appear by counsel. Cross interrogatories cannot be withdrawn unless by mutual consent. A witness cannot shield himself from answering a cross interrogatory, by a reference to his previous answer to a direct one.—*Union Bank* vs. *Torrey*, 2 Abbott, 269.

433. The deposition of a witness out of this State, shall be taken upon commission issued from the Court, under the seal of the Court, upon an order of the Judge, or Court, or County Judge, on the application of either party, upon five day's previous notice to the other. It shall be issued to a person agreed upon by the parties, or if they do not agree, to any Judge or Justice of the Peace selected by the officer granting the commission, or to a Commissioner appointed by the Governor of this State, to take affidavits and depositions in other States.

434. Such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled if the parties disagree as to their form, by the Judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or when the parties agree to that mode, the examination may be without written interrogatories.

435. The commission shall authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute; and to certify the deposition to the Court, in a sealed envelope directed to the Clerk, or other person designed

or agreed upon, and forwarded to him by mail or other usual channel of conveyance.

436. A trial, or other proceeding, shall not be postponed by reason of a commission not returned, except upon evidence satisfactory to the Court that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

CHAPTER VII.

OF PROCEEDINGS TO PERPETUATE TESTIMONY.

437. The testimony of a witness may be taken and perpetuated as provided in this chapter.

438. The applicant shall produce to a District Judge, or to a County Judge, an affidavit stating:

1st. That the applicant expects to be a party to an action, in a Court in this State.

2d. That the testimony of a witness residing in this State, whose place of residence is stated, is necessary to the prosecution or defence of such action; and generally the facts expected to be proved.

3d. That the party named who is expected to be adverse to the applicant, resides or is at the time in this State. The Judge may, thereupon, in his discretion, make an order allowing the examination, and prescribing how long before the examination the order and notice of the time and place thereof shall be served.

439. Upon proof of personal service upon the person who is expected to be the adverse party of the order, copy of the affidavit, and of a notice that the examination will be taken before a District Judge, or County Judge of the county wherein the witness resides, or may be at a specified time and place; such Judge may take the deposition of the witness, and the examination may, if necessary, be adjourned from time to time.

440. The examination shall be by question and answer, unless the parties otherwise agree. The deposition, when completed, shall be carefully read to and subscribed by the witness, then certified by the Judge and immediately thereafter filed in the office of the Clerk of the county where it was taken, together with the order for the examination of the witness, the

affidavit on which the same was granted, and the affidavit of service of affidavit, order or notice.

441. The affidavits filed with the deposition, or a certified copy thereof, shall be primary evidence of the facts stated therein, to show compliance with the provisions of this chapter.

442. If a trial be had between the persons named in the affidavit as parties expectant, or their successors in interest, upon proof of the death or insanity of the witness, or of his inability to attend the trial by reason of age, sickness or settled infirmity, the deposition, or a certified copy thereof, may be used by either party, subject to all legal objections. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination.

CHAPTER VIII.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

443. Every Court of this State, every Judge or Clerk of any Court, every Justice of the Peace and every Notary Public, and every officer authorised to take testimony or to decide upon evidence in any proceeding, shall have power to administer oaths or affirmations.

444. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

445. Any witness who desires it, may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed, in the following form: "You do solemnly, affirm, that the evidence you shall give in this issue (or matter,) pending between ——— and ———, shall be the truth, the whole truth, and nothing but the truth." Assent to this affirmation shall be made by the answer, "I do." A false affirmation or declaration shall be deemed perjury, equally with a false oath.

CHAPTER IX.

INSPECTION OF DOCUMENTS, AND MISCELLANEOUS PROVISIONS AS TO RECORDS AND WRITINGS.

446. Any Court in which an action is pending, or a Judge thereof, or a County Judge, may, upon notice, order either party to give to the other within a specified time an inspection and copy, or permission to take a copy of any book, document or paper in his possession, or under his control, containing evidence relating the merits of the action, or the defence therein. If compliance with the order be refused, the Court may exclude the book, document or paper, from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the Court may also punish the party refusing, for a contempt. This Section shall not be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness.

447. There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1st. When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made:

2d. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it, after reasonable notice:

3d. When the original is a record or other document, in the custody of a public officer:

4th. When the original has been recorded, and a certified copy of the records is made evidence by statute:

5th. When the original consists of numerous accounts or other documents, which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole.

The defendant in a suit pending, may be made to discover books, papers, and documents in his possession or power, relating to the merits thereof, and which are necessary to the plaintiff, to enable him to prepare for the trial.—*Gould* vs. *McCarty*, 1 Kern., 575.

The best evidence the nature of the case is susceptible of, must be adduced.

Proof of the loss of an instrument may be made by the party's own affidavit, to lay the foundation for proving its contents. But the affidavit of a third person, that a

trunk of the party, containing his papers, is lost, is insufficient, without showing that it contained the papers in question. But this the party may show by his own oath.—*McCann* vs. *Beach*, 2 Cal., 25.

In the case of lost instruments, where no copy has been preserved, it is not to be expected that witnesses can recite their contents, word for word.—*Posten* vs. *Bassett*, 5 Cal., 70.

The copy of a deed should not have been admitted in evidence, without proof of a proper and unavailing effort to produce the original.—*Robles* vs. *Forbes*, 5 Cal., 11.

448. The party producing a writing as genuine, which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise.

A card published in a newspaper, without the knowledge of either party to the suit, is no evidence but to impeach the credulity of a witness.—*Dwinelle* vs. *Henriques*, 1 Cal., 388.

It is error to admit letters in evidence, without proving that they were written by the party intended to be charged by their contents.—*Sinclair* vs. *Wood*, 3 Cal., 98.

To prove handwriting of a subscribing witness, he must be shown to be beyond the jurisdiction of the Court, or that diligent search for him had been made without avail. —*Powell's Heirs* vs. *Hendricks*, 3 Cal., 427.

449. A judicial record of this State, or the United States, may be proved by the production of the original, or a copy thereof, certified by the Clerk, or other person having the legal custody thereof, under the seal of the Court, to be a true copy of such record.

See Sec. 655.

450‡. The records and judicial proceedings of the Courts of any other State of the United States, may be proved or admitted in the Courts of this state, by the attestation of the Clerk and the seal of the court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or presiding magistrate, as the case may be, that the said attestation is in due form.

A certificate of exemplification of a judgment rendered in another State, when attested by the Clerk, under the seal of the court, and where the presiding judge of the court certifies that the attestation is in due form of law, is sufficient, under the Act of Congress of May 26, 1790, to sustain an action upon the judgment in another State.—*Thompson* vs. *Manrow*, 1 Cal., 428.

451. A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the Clerk, with the seal of the Court annexed, if there be a Clerk and seal; or by the legal keeper of the record, with the seal of his office annexed, if there be a seal, to be a true copy

of such record: together with a certificate of a Judge of the Court, that the person making the certificate is the Clerk of the Court, or the legal keeper of the record, and in either case, that the signature is genuine, and the certificate in due form; and also together with the certificate of the minister or ambassador of the United States, or of a consul of the United States, in such foreign country, that there is such a Court, specifying generally the nature of its jurisdiction, and verifying the signature of the Judge and Clerk, or other legal keeper of the record.

452. A copy of the judicial record of a foreign country shall also be admissible in evidence upon proof:

1st. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it:

2d. That such original was in the custody of the Clerk of the Court, or other legal keeper of the same: and,

3d. That the copy is duly attested by a seal, which is proved to be the seal of the Court where the record remains, if it be the record of a Court; or if there be no such seal, or if it be not a record of a Court, by the signature of the legal keeper of the original.

See Sec. 655.

453. Printed copies, in volumes, of statutes, code, or other written law, enacted by any other State, or Territory, or foreign Government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the Courts and judicial tribunals of such State, Territory or Government, shall be admitted by the Courts and officers of this State, on all occasions, as presumptive evidence of such laws.

See Sec. 655.

454. A seal of a Court or public office, when required to any writ or process, or proceeding, or to authenticate a copy of any record or document, may be impressed with wax, wafer, or any other substance, and then attached to the writ, process or proceeding, or to the copy of the record or document, or it may be impressed on the paper alone.

The impression of the seal may be made upon paper only.—*Connelly* vs. *Goodwin*, 5 Cal., 39.

TITLE XII.

OF THE WRIT OF CERTIORARI AND OF MANDAMUS.

CHAPTER I.

THE WRIT OF CERTIORARI, OR REVIEW.

455. The writ of certiorari may be denominated the writ of review.

A certiorari, and not a mandamus should issue to a District Court to send up documents where no appeal would lie.—*Field* vs. *Turner*, 1 Cal., 152.

When the writ will lie.—In re *Hanson*, 2 Cal., 262.

A certiorari to the Board of Supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the Board.—*Wilson* vs. *Supervisors of Sacramento County*, 3 Cal., 386.

456. This writ may be granted on application, by any Court of this State, except Justice's, Recorder's, or Mayor's Court; the writ shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the Court, any plain, speedy and adequate remedy.

See Sec. 653.

When the County Court should issue writ.—*Clary* vs. *Hoagland*, 5 Cal., 78.

457. The application shall be made on affidavit by the party beneficially interested, and the Court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

458. The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the Clerk, if there be one, shall return the writ with the transcript required.

459. The writ of review shall command the party to whom it is directed to certify fully to the Court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, (describing or referring to them, with convenient certainty,) that the same may be reviewed by the Court; and requiring the party in the mean time to desist from further proceedings in the matter to be reviewed.

460. If a stay of proceedings be not intended, the words requiring the stay shall be omitted from the writ; these words may be inserted or omitted in the sound discretion of the Court; but if omitted, the power of the inferior Court or officer shall not be suspended, nor the proceedings stayed.

461. The writ shall be served in the same manner as a summons in civil action, except when otherwise expressly directed by the Court.

462. The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

463. If the return to the writ be defective, the Court may order a further return to be made. When a full return has been made, the Court shall proceed to hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling or modifying the proceedings below.

464. A copy of the judgment, signed by the Clerk, shall be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding certified up.

465. A copy of the judgment, signed by the Clerk, entered upon, or attached to the writ and return, shall constitute the judgment roll. If the proceeding be had in any other than the Supreme Court, an appeal may be taken from the judgment in the same manner, and upon the same terms, as from a judgment in a civil action.

CHAPTER II.

THE WRIT OF MANDATE, OR MANDAMUS.

466. The writ of mandamus may be denominated the writ of mandate.

Judgment may be affirmed as to mandate, and reversed as to costs.—*McDougal* vs. *Roman*, 2 Cal., 80.

A mandate lies to compel a Judge of a District Court to enter judgment on a referee's report.—*Russell* vs. *Elliott*, 2 Cal., 245.

The Supreme Court may exercise its jurisdiction by mandate.—*People* vs. *Turner*, 1 Cal., 143.

Mandate is proper to compel a District Court to restore an attorney to the roll.—Ib.

A mandate will not lie to compel an inferior Court to issue process.—*Adams* vs. *Town*, 3 Cal., 247; *Peralta* vs. *Adams*, 2 Cal., 594.

A mandamus will not lie against a Sheriff to compel him to make a deed to land to a purchaser at execution sale, who refuses to pay the purchase money, for the reason that he is the oldest judgment and execution creditor, and entitled to the money; especially, when there is an unsettled contest as to the question of lien.—*Williams* vs. *Smith*, 6 Cal. Jan'y T.; *People* vs. *Hays*, 4 Cal., 127.

A mandate will not lie, where there is any other specific, speedy, and adequate remedy.—*People* vs. *Olds*, 3 Cal., 167.

A mandate will not issue to compel the performance of an act where the party is invested with discretionary power, but will issue when directory.—*People* vs. *Bell*, 4 Cal., 177.

467. It may be issued by any Court in this State, except a Justice's, Recorder's or Mayor's Court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act, which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right, or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

468. This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

See Sec. 653.

469. The writ shall be either alternative or peremptory; the alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the Court, at a specified time and place, why he has not done so. The peremptory writ shall be in a similar form, except that the words requiring the party to show cause why he has not done as commanded, shall be omitted, and a return day shall be inserted.

470. When the application to the Court is made without notice to the adverse party, and the writ be allowed, the alternative shall be first issued: but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default. The case shall be heard by the Court, whether the adverse party appear or not.

471. On the return day of the alternative, or the day on which the application of the writ is noticed, or such further day as the Court may allow, the party on whom the writ or notice shall have been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

472. If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the Court, may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the Court. The question to be tried shall be distinctly stated in the order for trial, and the county shall be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

473. On the trial, the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may countervail it by proof, either in direct denial, or by way of avoidance.

474. If either party be dissatisfied with the verdict of the jury he may move for a new trial upon a statement prepared as provided in Section one hundred and ninety-five. The motion for a new trial, may, upon a reasonable notice, be brought on before the Judge of the Court in which the cause was tried, either in term or vacation. If a new trial be granted the jury shall, within five days thereafter, unless the parties agree on a longer time, be summoned to try the issue. After a second verdict in favor of the same party a new trial shall not be had.

475. If no notice for a new trial be given, or if given, be denied, the Clerk, within five days after the rendition of the verdict or denial of the motion, shall transmit to the Court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which, either party may bring on the argument of the application, upon reasonable notice to the adverse party.

476. If no answer be made the case shall be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned in Section four hundred and seventy-two, but only such matters as may be explained or avoided by a reply, the Court may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements, not affecting the substantial rights of the parties, the Court shall proceed to hear, or fix a day for hearing the argument of the case.

477. If judgment be given for the applicant he shall recover the damages which he shall have sustained, as found by the jury, or as may be

determined by the Court, or referees, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate shall also be awarded without delay.

478. The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the Court.

479. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the Court, that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to pay the same, the Court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the Court may order the party to be imprisoned for a period not exceeding three months, and may take any orders necessary and proper for the complete enforcement of the writ. If a fine be imposed upon a Judge or officer who draws a salary from the State or county, a certified copy of the order shall be forwarded to the Comptroller, or County Treasurer, as the case may be, and the amount thereof may be retained from the salary of such Judge or officer. Such Judge or officer, for his wilful disobedience shall also be deemed guilty of a misdemeanor in office.

TITLE XIII.

OF CONTEMPTS AND THEIR PUNISHMENTS.

480. The following acts or omissions shall be deemed contempts:

1st. Disorderly, contemptuous, or insolent behavior towards the Judge whilst holding Court, or engaged in his judicial duties at chambers, or towards referees or arbitrators whilst sitting on a reference or arbitration, tending to interrupt the due course of a trial, reference or arbitration, or other judicial proceeding:

2d. A breach of the peace, boisterous conduct, or violent disturbance in presence of the Court, or its immediate vicinity, tending to interrupt the due course of a trial, or other judicial proceeding:

3d. Disobedience or resistance to any lawful writ, order, rule or process, issued by the Court or Judge at chambers:

4th. Disobedience of a subpœna duly served, or refusing to be sworn or answer as a witness:

5th. Rescuing any person or property in the custody of any officer, by virtue of an order of process of such Court or Judge at chambers.

See Sec. 245.

A person cannot be deemed guilty of contempt for disobedience to the process of the Court, who trespasses upon a party put in possession under execution, as the authority of the Court has then ceased.—*Loring* vs. *Illsley*, 1 Cal., 24.

481. When a contempt is committed in the immediate view and presence of the Court, or Judge at chambers, it may be punished summarily; for which an order shall be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the Court, or Judge at chambers, an affidavit shall be presented to the Court, or Judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators.

482. When the contempt is not committed in immediate view and presence of the Court or Judge, a warrant of attachment may be issued to bring the person charged to answer, or without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment shall be issued without such previous attachment to answer, or such notice or order to show cause.

483. Whenever a warrant of attachment is issued pursuant to this chapter, the Court or Judge shall direct whether the person charged may be let to bail for his appearance, upon the warrant, or detained in custody without bail; and if he may be bailed, the amount in which he may be let to bail. The directions given in this respect shall be specified in the warrant, or endorsed thereon.

484. Upon executing the warrant of attachment, the Sheriff shall keep the person in custody, bring him before the Court or Judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next Section.

485. When a direction to let the person to bail is contained in the warrant of attachment, or endorsed thereon, he shall be discharged from the arrest, upon executing and delivering to the officer, at any time before

the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the Court or Judge thereupon; or they will pay as may be directed, the sum specified in the warrant.

486. The officer shall return the warrant of arrest and the undertaking, if any, received by him from the person arrested, by the return day specified therein.

487. When the person arrested has been brought up or appeared, the Court or Judge shall proceed to investigate the charge, and shall hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

488. Upon the answer and evidence taken, the Court or Judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both.

489. When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act shall be specified in the warrant of commitment.

490. Persons proceeded against according to the provisions of this chapter, shall also be liable to indictment for the same misconduct, if it be an indictable offence; but the Court before which a conviction is had on the indictment, in passing sentence, shall take into consideration the punishment before inflicted.

491. When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the Court or Judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action shall be the extent of the loss or injury sustained by the aggrieved party, by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

492. Whenever by the provisions of this chapter an officer is required to keep a person arrested on a warrant of attachment in custody, and to

bring him before a Court or Judge, the inability, from illness or otherwise, of the person to attend shall be a sufficient excuse for not bringing him up; and the officer shall not confine a person arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

Where an order of the District Court, fining and imprisoning for contempt, does not specify on its face wherein the contempt consisted, it will be reversed on certiorari.—Ex parte, *Stephen J. Field*, 1 Cal., 187.

493. The judgment and orders of the Court or Judge, made in cases of contempt, shall be final and conclusive. The punishment shall be by fine or by imprisonment, but no fine shall exceed the sum of five hundred dollars, and no imprisonment shall exceed the period of five days, except as provided in Section 489.

This order is liable to be reviewed by a higher tribunal.—*Lucas* vs. *Allen*, 5 Cal., 25.

TITLE XIV.

OF COSTS.

494†¶. The measure and mode of compensation of attorneys and counsellors shall be left to the agreement, express or implied, of the parties. But there shall be allowed to the prevailing party in any action in the Supreme Court, District Courts, Superior Court of the City of San Francisco, and County Courts, his costs and necessary disbursements in the action or special proceeding in the nature of the action.

Costs by way of indemnity ought not to be taxed, in case of non-suit.—*Rice* vs. *Leonard*, 5 Cal., 15.

On demurrer, costs are to be awarded one defendant only.—*Gunter* vs. *Barber*, *Adm'r*, Superior Court.

An attorney has no lien on a judgment for his costs.—Ex parte *Kyle*, 1 Cal., 331.

495†. Costs shall be allowed of course to the plaintiff upon a judgment in his favor, in the following cases:

1st. In action for the recovery of real property:

2d. In an action to recover the possession of personal property, when the value of the property amounts to two hundred dollars or over. Such value shall be determined by the jury, Court, or referee, by whom the action is tried:

3d. In an action for the recovery of money or damages where plaintiff recovers two hundred dollars or over:

4th. In a special proceeding in the nature of an action.

See Sec. 255.

Where a remittitur is sent down, the Clerk of the District Court may issue execution for costs.—"*Marysville*" vs. *Buchanan*, 3 Cal., 212.

The plaintiff is bound by his statement of the value of the property, if no other is found by the Court, and costs will be taxed accordingly.—*Edgar* vs. *Gray*, 5 Cal., 37.

496. When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were at the commencement of the previous action openly within this State; but the disbursements of the plaintiff shall be allowed to him in each Section [action.]

497. Costs shall be allowed, of course, to the defendant upon a judgment in his favor in the actions mentioned in Section 495, and in a special proceeding in the nature of an action.

See note to Sec. 145.

498. In other actions than those mentioned in Section 495, costs may be allowed, or not; and if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the Court; but no costs shall be allowed in an action for the recovery of money or damages when the plaintiff recovers less than two hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than two hundred dollars.

Costs, in this Section, refer to disbursements also, and shall not be recovered, if the judgment rendered is for less than two hundred dollars.—*Campbell* vs. *Houston*, 12th Dist. Court.

Quere.—Should the defendant then recover his costs and disbursements of the plaintiff, or should each party pay his own costs?

499. When there are several defendants in the actions mentioned in Section 495, not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the Court shall award costs to such of the defendants as have judgment in their favor.

In an action for tort against two, where there is a verdict in favor of one defendant, and in favor of the plaintiff against the other defendant, the defendant prevailing, is entitled, of course, to costs, under this Section.—*Decker* vs. *Gardiner*, 4 Seld., 29.

500. In the following cases the costs of an appeal shall be in the discretion of the Court:

1st. When a new trial is ordered:

2d. When a judgment is modified.

Where a judgment was affirmed in part, and reversed in part, the respondent was allowed his costs in the Court below, but was required to pay the costs of appeal.—*Cole* vs. *Swanston*, 1 Cal., 51.

See Rule XXXIII.

501¶. Repealed.

502¶. Repealed.

503¶. Repealed.

504¶. The fees of referees shall be five dollars to each, for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed.

505¶. When an application is made to a Court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the Court or referee, as a condition of granting the same.

506. When, in an action for the recovery of money only, the defendant alleges in his answer, that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in Court, for the plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff shall not recover costs, but shall pay costs to the defendant.

507. In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorised by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the Court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

508. When the decision of a Court of inferior jurisdiction in a special proceeding is brought before a Court of higher jurisdiction for a review in any other way than by appeal, the same costs shall be allowed as in

cases on appeal, and may be collected by execution, or in such manner as the Court may direct, according to the nature of the case.

509. On the commencement of an action, the plaintiff, and on the filing of notice of appeal from a final judgment, the appellant shall pay to the Clerk three dollars, to be applied to the salary of the Judge or Judges of the Court in which the payment is made. Each Clerk shall keep an account of money so received, and shall pay over the same, at the end of each month, to the Judge or Judges of the Court, taking duplicate receipts of each payment, one of which shall be filed by the Clerk in his own Court. On the first day of each month the Clerk of each County Court shall deliver to the Treasurer of his county, and the Clerk of the Superior Court of the City of San Francisco to the Treasurer of said City an account of all sums received, specifying the cases in which received, and of all sums paid out, with the receipt of the Judge or Judges therefor; at the same time a like account shall be forwarded by the Clerks of the District Courts to the Comptroller of the State, of the sums paid into their respective Courts, and of the sums paid out, with the receipts of the Judges therefor. In paying the salary of any District Judge, the Comptroller, and in paying the salary of a Judge or Judges of the Superior Court of the City of San Francisco, the City Treasurer, and in paying the salary of any County Judge, the County Treasurer, shall deduct the amount paid to such Judge or Judges, under the provisions of this Section, as shown by the receipts of the Judge or Judges in their respective offices.

510¶. The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the Clerk of the Court within two days after the verdict or decision of the Court, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum shall be verified by the oath of the party, or his attorney, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding.

For amendment, or retaxation of costs, see *Burnham* vs. *Hays*, 3 Cal., 115.

511. The Clerk shall include in the judgment entered up by him, the costs, the per centage allowed, and any interest on the verdict from the time it was rendered.

512. When the plaintiff in an action resides out of the State, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff, may be required by the defendant. When

required, all proceedings in the action shall be stayed until an undertaking, executed by two or more persons, be filed with the Clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the Court or Judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking be executed and filed.

513. Each of the sureties on the undertaking mentioned in the last Section, shall annex to the same an affidavit that he is a resident and householder or freeholder within the county, and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

514. After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the Court or Judge may order the action to be dismissed.

TITLE XV.

OF MOTIONS, ORDERS, NOTICES, SERVICE OF PAPERS, AND MISCELLANEOUS PROVISIONS.

515. Every direction of a Court or Judge made or entered in writing and not included in a judgment, is denominated an order. An application for an order is a motion.

516. Motions shall be made in the county in which the action is brought, or in an adjoining county in the same district.

517†. When a written notice of a motion is necessary, it shall be given, if the Court be held in the same district with both parties, five days before the time appointed for the hearing, otherwise ten days; but the Court, or Judge, or County Judge, may prescribe a shorter time.

See Sec 531.

See Rules XXXVI, et sqq.

A slight error in the title of a cause, when there is no other suit pending between the parties, will not invalidate the notice.—*Mills* vs. *Dunlap*, 3 Cal., 94.

Statutes fixing the time for filing papers in a cause, are merely directory, and the Court has it always in its power, in the exercise of a proper discretion, to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension.—*Wood* vs. *Fobes*, 5 Cal., 14.

518. When a notice of motion is given, an order to show cause is made returnable before a Judge out of Court, and at the time fixed for the motion, or on the return day of the order, if the Judge is unable to hear the parties, the matter may be transferred by his order to some other Judge, before whom it might originally have been brought.

519. Written notices and other papers, when required to be served on the party or an attorney, shall be served in the manner prescribed in the next three Sections, when not otherwise provided; but nothing in this title shall be applicable to original or final process, or any proceedings to bring a party into contempt.

Service of a notice or other papers on a Sunday, is irregular and void.—*Field* vs. *Park*, 20 John., 140.

520. The service may be personal, by delivery to the party or attorney, on whom the service is required to be made, or it may be as follows:

1st. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open, so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same enclosed in an envelope, into the post-office, directed to such attorney:

2d. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, enclosed in an envelope, into the post office directed to such party.

521. Service by mail may be made, when the person making the service, and the person on whom it is to be made, reside at different places, between which there is a regular communication by mail.

When the paper is thus deposited in the proper post-office, correctly addressed and postage paid, the service is deemed complete, and the party to whom it is addressed takes the risk of the failure of the mail.—*Lawler* vs. *Saratoga Mut. Ins. Co.*, 2 Code Rep. 114; *Jacobs* vs. *Hooker*, 1 Barb. 71.

522. In case of service by mail, the notice or other paper shall be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. And in such case the time of service shall be increased one day for every twenty miles distance between the place of deposit and the place of address.

Giving notice by mail is depositing a letter containing the requisite information, properly addressed, into the post-office.—*Vassar* vs. *Camp*, 14 Barb.. 341.

523. A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney shall be entitled to notice of all subsequent proceedings, of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him, unless he be imprisoned for want of bail.

524. When a plaintiff or defendant who has appeared resides out of of the State, and has no attorney in the action or proceeding, the service may be made on the Clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney instead of the party, except of subpœnas, of writs, and other process issued in the suit, and of papers to bring him into contempt.

It is irregular to serve papers in a cause upon the attorney, after he becomes a non-resident.—*Diefendorf* vs. *House*, 9 Pr. R. 243.

525. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

526. Whenever two or more actions are pending at one time between the same parties, and in the same Court, upon causes of action which might have been joined, the Court may order the actions to be consolidated into one.

527. An action may be brought by one person against another, for the purpose of determining an adverse claim which the latter makes against the former, for money or property, upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as security.

528. The Clerk shall keep among the records of the Court, a register of actions. He shall enter therein the title of the action, with brief notes under it, from time to time, of all papers filed, and proceedings had therein.

529. When there are three referees, or three arbitrators, all shall meet, but two of them may do any act which might be done by all.

530. The time within which an act is to be done, as provided in this Act, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

Easton vs. *Chamberlin*, 3 Pr. R., 412; *Dayton* vs. *McIntyre*, 3 Code Rep., 164; 5 Pr. R.. 117.

A notice served on Saturday for Monday, is not a notice of two days.—*Whipple* vs. *Williams*, 4 Pr. R. 28.

531. An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for any purpose, as if duly entitled, if it intelligibly refer to such action or proceeding.

See note to Sec. 517.

On a motion to vacate an order, where the affidavits intelligibly refer to the action, an objection that the affidavits are entitled in the wrong Court will be disregarded.—*Blake* vs. *Locy*, 1 Code Rep. N. S., 406.

532. When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of a citizen thereof, who has held the cause of action from the time it accrued.

TITLE XVI.

OF PROCEEDINGS IN CIVIL CASES IN JUSTICES' COURTS.

CHAPTER I.

OF THE PARTIES AND THE TIME AND PLACE OF COMMENCING ACTIONS IN JUSTICES' COURTS.

533. The provisions of Title I. of this Act, as to parties to actions, shall be applicable to actions of which a Justice's Court has jurisdiction.

534. Parties in Justices' Courts may prosecute or defend in person, or by attorney; and any person, on the request of a party, may act as his attorney, except that the constable by whom the summons or jury process was served, shall not appear or act on the trial in behalf of either party.

535†. No person shall be held to answer to any summons issued against him from a Justice's Court, in civil action, in any township or city other than the one in which he shall reside, except in the cases following:

1st. When there shall be no Justice's Court for the township or city in which the defendant may reside, or no Justice competent to act on the case:

2d. When two or more persons shall be jointly, or jointly and severally bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties, the plaintiff may prosecute his action in a Justice's Court of the township or city in which any of the debtors or other persons liable may reside:

3d. In cases of injury to the person, or to real or personal property, the plaintiff may prosecute his action in the township or city where the injury was committed:

4th. When personal property unjustly taken or detained is claimed, or damages therefor are claimed, the plaintiff may bring his action in any township or city in which the property may be found, or in which the property was taken:

5th. When the defendant is a non-resident of the county, he may be sued in any township or city wherein he may be found:

6th. When a person has contracted to perform any obligation at a particular place, and resides in another township or city, he may be sued in the township or city in which such obligation is to be performed, or in which he resides:

7th. When the foreclosure of a mortgage or the enforcement of a lien upon personal property is sought by the action, the plaintiff may sue in the township or city where the property is situated:

8th. Any person or persons residing in the City of San Francisco may be held to answer to any summons issued against him or them from the Court of a Justice for any township within the corporate limits of the City of San Francisco, in any action or proceeding whereof Justices of the Peace of the City or County of San Francisco have or may have jurisdiction by law: *Provided*, nothing herein contained shall be construed to allow any Justice of said city or county to hold a Court in any other township than the one for which he shall have been elected.

536. Judgment upon confession may be entered up in any Justice's Court in the State specified in the confession.

A confession for an amount exceeding the jurisdiction is a nullity.—*Griswold* vs. *Sheldon*, 1 Code Rep., N. S., 261; *Daniels* vs. *Hinkston*, 5 Pr. R., 322.

537. Justices' Courts shall have jurisdiction of an action upon the voluntary appearance of the parties without summons, without regard to their residences, or the place where the cause of action arose, or the subject matter of the action may exist.

CHAPTER II.

SUMMONS, ARREST, ATTACHMENT, AND CLAIM OF PERSONAL PROPERTY.

538. Actions in Justices' Courts shall be commenced by filing a copy of the account, note, bill, bond, or instrument upon which the action is brought, or a concise statement in writing of the cause of action, and the issuance of a summons thereon, or by the voluntary appearance and pleadings of the parties without summons. In the latter case the action shall be deemed commenced at the time of appearance.

539. When a guardian is necessary, he shall be appointed by the Justice, as follows:

1st. If the infant be a plaintiff, the appointment shall be made before the summons is issued upon the application of the infant, if he be of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent in writing of the guardian to be appointed, and to be responsible for costs, if he fail in the action, shall be first filed with the Justice.

2d. If the infant be defendant, the guardian shall be appointed at the time the summons is returned, or before the pleadings. It shall be the right of the infant to nominate his own guardian, if the infant be over fourteen years of age, and the proposed guardian be present and consent in writing to be appointed. Otherwise the Justice may appoint any suitable person who gives such consent.

540. The summons shall be addressed to the defendant by name, or if his name be unknown, by a fictitious name; and shall summon him to appear before the Justice at his office, naming its township or city, and at

a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described, in general terms, sufficient to apprise the defendant of the nature of the claim against him; and in action for money or damages, shall state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer. It shall be subscribed by the Justice before whom it is returnable.

541‡. The time mentioned in the summons for the appearance of the defendant and the time of service shall be as follows:

1st. When the summons is accompanied by an order to arrest the defendant, it shall be returnable immediately.

2d. When the defendant is not a resident of the township or city, or when the plaintiff is not a resident, it shall be returnable not more than two days from its date, and shall be served at least one day before the time for appearance.

3d. In all other cases, it shall be returnable in not less than two or more than ten days from its date, and shall be served at least two days before the time for appearance.

542. The summons shall be served by the Sheriff or a constable of the county, as follows:

1st. If the action be against a corporation, by a delivery of a copy to the President or other head of the corporation, or to the Secretary, Cashier, or managing agent thereof; or when no such officer resides in the county, to a director resident therein:

2d. If against a minor under the age of fourteen years, by delivery of a copy to such minor, and also to his father, mother, or guardian; or if there be none within the county, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is:

3d. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, by delivery of a copy to such guardian:

4th. In all other cases, by delivery of the copy to the defendant personally.

The constable may appoint deputies.—*Taylor* vs. *Brown*, 4 Cal., 188.

543‡. When the person upon whom the service is to be made resides out of the State, or has departed from the State, or cannot, after due diligence, be found within the State, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the Justice, and it shall, in like manner, appear, that a cause of action

exists against the defendant in respect to whom the service is to be made, the Justice shall grant an order that the service be made by the publication of the summons. The order shall direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week: *Provided*, that a publication against a defendant residing out of the State or absent therefrom, shall not be less than three months. The service of summons shall be deemed complete at the expiration of the time prescribed by the order of publication; the Justice shall also direct a copy of the summons to be forthwith deposited in the post office, directed to the person to be served at his place of residence.

544. An order to arrest the defendant may be endorsed on a summons issued by the Justice, and the defendant may be arrested thereon, by the Sheriff or Constable, at the time of serving the summons, and brought before the Justice, and there detained until duly discharged in the following cases, arising after the passage of this act:

1st. In an action for the recovery of money, or damages, on a cause of action arising upon a contract, express or implied, when the defendant is about to depart from the State, with intent to defraud his creditors; or where the action is for a wilful injury to the person, or for taking, detaining, or injuring personal property:

2d. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use by an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity:

3d. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought:

4th. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female shall be arrested in any action.

545. Before an order of arrest shall be made, the party applying shall prove to the satisfaction of the Justice, by the affidavit of himself or some other person, the facts on which the application is founded. The plaintiff shall also execute and deliver to the Justice a written undertaking, with two or more sureties, to the effect that if the defendant recover judgment, the plaintiff will pay to him all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking which shall be at least two hundred dollars.

546. The defendant, immediately upon being arrested, shall be taken to the office of the Justice who made the order, and if he be absent or unable to try the action, or if it be made to appear to him by the affidavit of defendant, that he is a material witness in the action, the officer shall immediately take the defendant before the next Justice of the city or township, who shall take cognizance of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

547. The officer making the arrest shall immediately give notice thereof to the plaintiff, or his attorney or agent, and endorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

548. The officer making an arrest shall keep the defendant in custody until duly discharged by order of the Justice.

549. The defendant under arrest, on his appearance with the officer, may demand a trial immediately; and upon such demand being made, the trial shall not be delayed beyond three hours, except by the trial of another action pending at the time; or he may have an adjournment, and be discharged on giving bail, as provided in the next Section. An adjournment at the request of the plaintiff, beyond three hours, shall discharge the defendant from arrest, but the action may proceed, notwithstanding; and the defendant shall be subject to arrest on the execution in the same manner as if he had not been so discharged.

See Sec. 582.

550. If the defendant on his appearance demand an adjournment, the same shall be granted, on condition that he execute and file with the Justice an undertaking, with two or more sureties, to be approved by the Justice, to the effect that he will render himself amenable to the process of the Court during the pendency of the action, and such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action. On filing the undertaking specified in this Section, the Justice shall order the defendant to be discharged from custody.

551. In an action upon a contract, express or implied, made after the passage of this Act, for the direct payment of money, which contract is made or payable in this State, and is not secured by mortgage upon real or personal property, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached

as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as hereinafter provided.

552. A writ to attach the property of the defendant shall be issued by the Justice, on receiving an affidavit by or on behalf of the plaintiff, showing that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs, or counter claims) upon a contract express or implied, for the direct payment of money, that such contract was made after the passage of this Act, and was made or is payable in this State, and that the payment of the same has not been secured by any mortgage on real or personal property.

This Section has not been amended so as to authorize an attachment upon a contract made prior to the passage of this Act, or against non-residents, as in Sec. 120.

553. Before issuing the writ, the justice shall require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment.

Proceedings on an attachment bond are void, if the Justice takes the bond in an amount exceeding his jurisdiction.—*Benedict* vs. *Bray*, 2 Cal., 251.

554. The writ may be directed to the Sheriff or any Constable of the county, and shall require him to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand besides costs; in which case, to take such undertaking.

555. The Sections of this Act, from Section one hundred and twenty-four to Section one hundred and forty-one, both inclusive, shall be applicable to attachments issued in Justice's Court, the word "Constable" being substituted for the word "Sheriff," whenever the writ is directed to a Constable, and the word "Justice" being substituted for the word "Judge."

556. The plaintiff in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

557. When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1st. That the plaintiff is the owner of the property claimed, (particularly describing it,) or is lawfully entitled to the possession thereof:

2d. That the property is wrongfully detained by the defendant:

3d. The alleged cause of the detention thereof, according to his best knowledge, information, and belief:

4th. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution on an attachment against the property of the plaintiff, or if seized, that it is by statute exempt from such seizure: and,

5th. The actual value of the property.

558. The Justice shall thereupon, by an endorsement in writing upon the affidavit, order the Sheriff or a Constable of the county, to take the same from the defendant, and deliver it to the plaintiff, upon receiving the undertaking mentioned in the following Section.

This Section has not been amended so as to give the party or his attorney, the authority to require the taking of the property as in Sec. 101.

559. Upon the receipt of the affidavit, and order, with a written undertaking, executed by two or more sufficient sureties, approved by the officer, to the effect that they are bound in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant if return thereof be adjudged, and for the payment to him of such sum as may, from any cause, be recovered against the plaintiff, the officer shall forthwith take the property described in the affidavit, if it be in the possession of the defendant, or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, order and undertaking, by delivering the same to him personally if he can be found within the county, or to his agent from whose possession the property is taken, or if neither can be found within the county, by leaving them at the usual place of abode of either within the county, with some person of suitable age and discretion, or if neither of them have any known place of abode within the county, by putting them into the nearest post office directed to the defendant.

560. The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the officer that he excepts to the sufficiency of the sureties; if he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the

sureties shall justify on notice before the justice; and the officer shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next Section.

561. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the officer a written undertaking executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within two days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in this chapter.

562. The defendant's sureties, upon reasonable notice to the plaintiff, shall justify before the Justice; and upon such justification, the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time appointed, he shall deliver the property to the plaintiff.

563. If the property or any part thereof, be concealed in a building or enclosure, the officer shall publicly demand its delivery, and if it be not delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession.

564. When the officer shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

565. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds to such title or right, and serve the same upon the officer, the officer shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim, by an under-

taking executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the officer, unless so made.

566. The officer shall return the order and affidavit, with his proceedings thereon, to the Justice within five days after taking the property mentioned therein.

567. The qualification of sureties on the several undertakings required by this chapter, shall be as follows:

1st. Each of them shall be a resident and a householder, or freeholder, within the county.

2d. Each shall be worth double the amount stated in the undertaking over and above all his debts and liabilities, exclusive of property exempt from execution.

568. For the purpose of justification, each of the sureties shall attend before the Justice at the time mentioned in the notice, and may be examined on oath, on the part of the adverse party, touching his sufficiency, in such manner as the Justice, in his discretion, may think proper. The examination shall be reduced to writing and subscribed by the sureties, if required.

569. If the Justice find the sureties sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and file the same, and the officer shall thereupon be exonerated from liability.

CHAPTER III.

PLEADINGS AND TRIAL.

570. The pleadings in Justices' Courts shall be:

1st. The complaint by the plaintiff stating the cause of action:

2d. The answer by the defendant, stating the ground of the defence.

571. The pleading shall be in writing, and verified by the oath of the party, his agent or attorney, when the action is:

1st. For the foreclosure of any mortgage or the enforcement of any lien on personal property:

2d. For a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements, or other possessions:

3d. To recover possession of a "mining claim." In other cases the pleadings may be oral or in writing.

572. When the pleadings are oral, the substance of them shall be entered by the Justice in his docket; when in writing, they shall be filed in his office, and a reference made to them in the docket. Pleadings shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what is intended.

It is not the policy of the law to confine parties to any nice strictness in pleading.—*Cronise* vs. *Carghill*, 4 Cal., 120.

573. The complaint shall state in a plain and direct manner, the facts constituting the cause of action.

574. The answer may contain a denial of any of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense, or a counter claim upon which an action may be brought by the defendant against the plaintiff in a Justice's Court.

575. A statement in answer that the party has not sufficient knowledge or information, in respect to a particular allegation in the previous pleading of the adverse party to form a belief, shall be deemed equivalent to a denial.

576. When the cause of action or counter claim arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument to the Court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or set-off. The Court may, at the time of the pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence.

577‡. If the plaintiff annex to his complaint, or file with the Justice at the time of issuing the summons, a copy of the promissory note, bill of exchange, or other written obligation for the payment of money, upon

which the action is brought, the defendant shall be deemed to admit the genuineness of the signatures of the makers, endorsers, or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath.

578. Either party may object to a pleading of his adversary, or to any part thereof, that it is not sufficiently explicit to enable him to understand it, or that it contains no cause of action or defence, although it be taken as true. If the Court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.

579. A variance between the proof on the trial and the allegations in a pleading, shall be disregarded as immaterial, unless the Court be satisfied that the adverse party has been misled to his prejudice thereby.

580. The pleadings may be amended at any time before the trial, to supply a deficiency or omission, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the Court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The Court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the Court, not exceeding twenty dollars; but such payment shall not be required unless an adjournment is made necessary by the amendment; nor shall an amendment be allowed after a witness is sworn on the trial, when an adjournment thereby will be made necessary.

581. The parties shall not be at liberty to give evidence by which the question of title to real property shall be raised on the trial before a Justice; and if it appear from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath, or that of his agent or attorney, that the determination of the action will necessarily involve the decision of a question of title to real property, the Justice shall suspend all further proceedings in the action, and certify the pleadings; or, if the pleadings be oral, a transcript of the same from his docket to the District Court of the county; and from the time of filing such pleadings or transcript with the County Clerk, the District Court shall have over the action the same jurisdiction as if it were originally commenced therein. Provided, that when the pleadings or transcript are certified to the District Court upon the answer of the defendant, he shall file an undertaking with

two or more sufficient sureties, to be approved by the Justice, to the effect that they will pay all costs of the action, if it be decided against him by the District Court.

582†. If at any time before the trial it appear, to the satisfaction of the Justice before whom the action is brought, by affidavit of either party, that such Justice is a material witness for either party, or if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before such Justice, by reason of the interest, prejudice or bias of the Justice, the action shall be transferred to some other Justice of the same or neighboring township; and in case a jury be demanded, and affidavit of either party is made, that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action shall be transferred to some other Justice of the Peace in the county. The Justice to whom an action may be transferred by the provisions of this Section, shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him. The Justice ordering the transfer of the action to another Justice, shall immediately transmit to the latter, on payment of costs, all the papers in the action, together with a certified transcript from his docket, of the proceedings therein.

Upon the return day of the summons, if a jury be required, or if the Justice be actually engaged in other official business, he may adjourn the trial without the consent of either party, as follows:

1st. When a party who is not a resident of the county is in attendance, the adjournment not to exceed twenty-four hours: when the defendant in attendance is under arrest, the adjournment not to exceed three hours.

2d. In other cases not to exceed five days.

583‡. The trial may be adjourned by consent, or upon application of either party, without the consent of the other, for a period not exceeding ten days, (except as provided in the next Section,) as follows:

1st. The party asking the adjournment, shall, if required by his adversary, prove by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and shall show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so:

2d. The party asking the adjournment, shall, also, if required by the adverse party, consent that the testimony of any witness of such adverse party who is in attendance, be then taken by deposition before the

Justice, which shall accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witness were produced. But such objections shall be made at the time of taking the deposition:

3d. The Court may also require the moving party to state upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed.

584‡. An adjournment may be had, either at the time of joining issue or at any subsequent time to which the case may stand adjourned; on application of either party, for a period longer than ten days, but not to exceed four months, from the time of the return of summons, upon proof by the oath of the party, or otherwise, to the satisfaction of the Justice, that such party cannot be ready for trial before the time which he desires an adjournment for want of material evidence, particularly describing it, and that the delay has not been made necessary by any act of negligence on his part since the action was commenced; and that he has used due diligence to procure the evidence, and has been unable to do so, and that he expects to procure the evidence at the time stated by him: *Provided*, that if the adverse party admit that such evidence would be given, and consent that it may be considered as given on the trial, or offered or overruled as improper, the adjournment shall not be had.

585. No adjournment shall be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, with sureties, to be approved by the Justice, to the effect that they will pay to the opposite party the amount of any judgment that may be recovered against the party applying.

586. If the plaintiff fail to appear at the return day of the summons, the action shall be dismissed. If the defendant fail to appear at the return day of the summons, or if either party fail to attend at a day to which the trial has been adjourned, or fail to make the necessary pleading or proof on his part, the case may, nevertheless, proceed, at the request of the adverse party, and judgment shall be given in conformity with the pleadings and proofs.

587. A trial by jury shall be demanded at the time of joining issue; and shall be deemed waived, if neither party then demand it. When demanded, the trial of the case shall be adjourned, until a time and place

fixed for the return of the jury. If neither party desire an adjournment, the time and place shall be determined by the Justice, and shall be on the same day, or within the next two days. The jury shall be summoned upon an order of the Justice from the citizens of the city or township, and not from the bystanders.

588. At the time appointed for the trial, the Justice shall proceed to call, from the jurors summoned, the names of the persons to constitute the jury for the trial of the issue. The jury by consent of the parties may consist of any number not more than twelve nor less than three.

589. If a sufficient number of competent and indifferent jurors do not attend, the Justice shall direct others to be summoned from the vicinity, and not from the bystanders, sufficient to complete the jury.

590. Either party may challenge the jurors. The challenges shall be either peremptory, or for cause. Each party shall be entitled to three peremptory challenges. Either party may challenge for cause, on any grounds set forth in Section 162. Challenges for cause shall be tried by the Justice in a summary manner, who may examine the juror challenged, and witnesses.

CHAPTER IV.

JUDGMENT AND EXECUTION.

591. Judgment that the action be dismissed without prejudice to a new action may be entered with costs in the following cases:

1st. When the plaintiff voluntarily dismisses the action before it is finally submitted:

2d. When he fails to appear at the time specified in the summons, or upon adjournment, or within one hour thereafter:

3d. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city; but if the objection be taken and overruled, it shall be cause only of reversal on appeal, and shall not otherwise invalidate the judgment; if not taken at the trial, it shall be deemed waived, and shall not be cause of reversal.

592. When the defendant fails to appear and answer, judgment shall be given for the plaintiff, as follows:

1st. When a copy of the account, note, bill, or other obligation upon which the action is brought, was filed with the Justice at the time the summons was issued, judgment shall be given without further evidence, for the sum specified in the summons:

2d. In other cases the Justice shall hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just; but in no case exceeding the amount specified in the summons.

593. Upon issue joined, if a jury trial be not demanded, the Justice shall hear the evidence, and decide all questions of fact and of law, and render judgment accordingly.

594‡. Upon a verdict, the Justice shall immediately render judgment accordingly. When the trial is by the Justice, judgment shall be entered immediately after the close of the trial; if the defendant has been arrested, and is still in custody; in other cases it shall be entered within four days after the close of the trial; if the action be on contract against two or more defendants, and the summons is served on one or more, but not on all, the judgment shall be entered up, only against those who were served, if the contract be a several or a joint and several contract; but if the contract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all, and the separate property of the defendants served.

595. When the amount found due to either party exceeds the sum for which the Justice is authorised to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

596. If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he shall not recover costs, but costs shall be adjudged against him, and if he recover, deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery otherwise than as to costs, as above provided.

597. When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it shall be so stated in the judgment and entered in the docket.

598. When the prevailing party is entitled to costs by this chapter, the Justice shall add their amount to the verdict; or in case of a failure of

the plaintiff to recover, or in case of a dismissal of the action, shall enter up judgment in favor of the defendant for the amount of such costs.

599‡. The Justice, on demand of the party in whose favor judgment is rendered, shall give him a transcript thereof, which may be filed and docketed in the office of the Clerk of the County where the judgment was rendered. The time of the receipt of the transcript by the County Clerk, shall be noted by him thereon and entered in the docket; and from that time executions may be issued by the County Clerk on such judgments to the Sheriff of any other County of the State, in the same manner as upon judgments recovered in the higher Courts. All process upon judgments recovered in Justice's Courts, to be executed within the same County, shall be issued by the Justice or his successors in office. No judgment rendered by a Justice of the Peace shall create any lien upon any lands of the defendant, unless a transcript of such judgment, certified by the Justice, be filed and recorded in the office of the Recorder. When such transcript is to be filed in any other County than that in which the Justice resides, such transcript shall be accompanied with the certificate of the County Clerk as to the official character of the Justice. When so filed and recorded in the office of the Recorder for any County, such judgment shall constitute a lien upon, and bind the lands and tenements of the judgment debtor, situated in the County where such transcript may be filed and recorded in favor of such judgment creditor as if such judgment had been rendered in the District Court of such county.

600. Execution for the enforcement of a judgment in a Justice's Court, may be issued on the application of the party entitled thereto, at any time within five years from the entry of judgment.

601. The execution, when issued by a Justice, shall be directed to the Sheriff or to a Constable of the county, and subscribed by the Justice by whom the judgment was rendered, or by his successor in office, and shall bear date the day of its delivery to the officer to be executed. It shall intelligibly refer to the judgment by stating the names of the parties, and the name of the Justice before whom, and of the county, and the township, or city, where, and at the time when, it was rendered; the amount of judgment, if it be for money; and if less than the whole is due, the true amount due thereon. It shall contain, in like cases, similar directions to the Sheriff or Constable as are required by the provisions of Title VII. of this Act, in an execution to the Sheriff.

602‡. The Sheriff or Constable to whom the execution is directed shall proceed to execute the same in the same manner as the Sheriff is

required by the provisions of Title VII. of this Act to proceed upon executions directed to him; and the Constable, when the execution is directed to him, shall be vested for that purpose with all the powers of the Sheriff and after issuing an execution, and either before or after its return, (if the same be returned unsatisfied either in whole or in part,) the judgment creditor shall be entitled to an order from the Justice requiring the judgment debtor to attend at a time to be designated in the order, and answer concerning the property before such Justice, and the attendance of such debtor may be enforced by the Justice. On his attendance, such debtor may be examined under oath concerning his property; and any person alleged to have in his hands property, monies, effects or credits of the judgment debtor, may also be required to attend and be examined, and the Justice may order any property in the hands of the judgment debtor, or any other person not exempt from execution, belonging to such debtor, to be applied towards the satisfaction of the judgment, and the Justice may enforce such order by imprisonment until complied with, but no judgment debtor or other person shall be required to attend before the Justice out of the county in which he resides.

CHAPTER V.

GENERAL PROVISIONS.

603‡. Those provisions of this Act, which are referred to in this Title and no other, shall, in addition to the provisions embraced in this Title, be applicable to Justice's Courts and proceedings therein.

604¶. Every Justice shall keep a book denominated a "Docket," in which he shall enter:

1st. The title of every action or proceeding:

2d. The object of the action or proceeding, and if a sum of money be claimed, the amount of the demand:

3d. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of these facts:

4th. The time when the parties or either of them appear, or their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them, if not in writing, a concise statement of the material parts of the pleading, and of all motions made during the trial by either party, and his decisions thereon:

5th. Every adjournment, stating on whose application, whether on oath, evidence, or consent, and to what time:

6th. The demand for a trial by jury, when the same is made, and by whom made; the order for the jury, and the time appointed for the trial and return of the jury:

7th. The names of the jury who appear and are sworn; the names of all witnesses sworn, and at whose request:

8th. The verdict of the jury, and when received; if the jury disagree, and are discharged, the fact of such disagreement and discharge:

9th. The judgment of the Court, specifying the costs included, and the time when rendered:

10th. The issuing of execution, when issued, and to whom; the renewals thereof, if any, and when made; and a statement of any money paid to the Justice, and when, and by whom:

11th. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed.

605. The several particulars of the last Section specified shall be entered under the title of the action to which they relate, and at the time when they occur. Such entries in a Justice's docket, or a transcript thereof, certified by the Justice or his successor in office, shall be primary evidence to prove the facts so stated therein.

606. A Justice shall keep an alphabetical index to his docket, in which shall be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs shall be entered in the index, in the alphabetical order of the first letter of the family names.

607. It shall be the duty of every Justice, upon the expiration of his term of office, to deposit with his successor his official dockets, as well his own, as those of his predecessors, which may be in his custody, to be kept as public records. If the office of a Justice become vacant by his death, or removal from the township or city, or otherwise, before his successor is elected and qualified, the dockets in possession of such Justice shall be deposited with the County Clerk of the county, to be by him delivered to the successor in office of the Justice.

608¶. Any Justice with whom the docket of his predecessor is deposited, may issue execution or other process, upon a judgment there entered and unsatisfied, in the same manner and with the same effect as the Jus-

tice by whom the judgment was entered might have done. In case of the creation of a new county, or the change of the boundary between two counties, any Justice into whose hands the docket of a Justice formerly acting as such within the same territory may come, shall, for the purposes of this Section be considered the successor of said former Justice.

609. The Justice elected to fill a vacancy shall be deemed the successor of the Justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township, or city, from that time shall be deemed the successor.

610. When two or more Justices are equally entitled under the last Section to be deemed the successors in office of the Justice, the County Judge shall, by a certificate, subscribed by him and filed in the office of the County Clerk, designate which Justice shall be the successor of a Justice going out of office, or whose office has become vacant.

611. The summons, execution, and every other paper made or issued by a Justice, except a subpœna, shall be filed without a blank left to be filled by another, otherwise it shall be void.

612. In case of the sickness, other disability, or necessary absence of a Justice on a return of a summons, or at the time appointed for a trial, another Justice of the same township or city may, at his request, attend in his behalf, and shall thereupon become vested with the power, for the time being, of the Justice before whom the summons was returnable. In that case the proper entry of the proceedings before the attending Justice, subscribed by him, shall be made in the docket of the Justice before whom the summons was returnable. If the case be adjourned, the Justice before whom the summons was returnable, may resume jurisdiction.

613. A Justice may, at the request of a party, and on being satisfied that it is expedient, specially depute any discreet person of suitable age, and not interested in the action, to serve a summons or execution with or without an order to arrest the defendant, or with or without a writ of attachment. Such deputation shall be in writing on the process.

The Constable may appoint deputies.—*Taylor* vs. *Brown*, 4 Cal., 188.

614. The person so deputed shall have the authority of a Constable in relation to the service, execution, and return of such process, and shall be subject to the same obligations.

615. A constable, notwithstanding the expiration of his term of office, may proceed and complete the execution of all final process which he has begun to execute, in the same manner as if he still continued in office, and his sureties shall be liable to the same extent.

616. A justice may punish as for contempt, persons guilty of the following acts, and no other:

1st. Disorderly, contemptuous, or insolent behavior towards the Justice while holding the Court, tending to interrupt the due course of a trial, or other judicial proceeding:

2d. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the Justice, or in the immediate vicinity of the Court held by him, tending to interrupt the due course of trial, or other judicial proceeding:

3d. Disobedience or resistance to the execution of a lawful order or process, made or issued by him:

4th. Disobedience to a subpœna duly served, or refusing to be sworn, or answer as a witness:

5th. Rescuing any person or property in the custody of an officer by virtue of an order or process of the Court held by him.

617. When a contempt is committed in the immediate view and presence of the Justice, it may be punished summarily, for which an order shall be made reciting the facts, as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the Justice, a warrant of arrest may be issued by such Justice, on which the person so guilty may be arrested and brought before the Justice immediately, when an opportunity to be heard in his defense or excuse shall be given. The Justice may thereupon discharge him, or may convict him of the offense. A Justice may punish for contempts, by fine or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day.

618. The conviction, specifying particularly the offense and the judgment thereon, shall be entered by the Justice in his docket.

619. Justices of the Peace may issue subpœnas in any action or proceeding in the Courts held by them, and final process on any judgment recovered therein, to any part of the county.

620. Justices of the Peace may issue commissions to take the depositions of witnesses out of this State, and settle interrogatories to be annexed thereto, and direct the manner in which the commissions shall be returned. The provisions of Title XI. of this Act, so far as the same are consistent with the jurisdiction and powers of Justices' Courts, shall be applicable to Justices' Courts, and to actions and proceedings therein.

621. In actions respecting "mining claims," proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the Constitution and laws of this State, shall govern the decision of the action.

622. A new trial may be granted by the Justice, on motion, within ten days after the entry of judgment, for any one of the following causes:

1st. Accident or surprise, which ordinary prudence could not have guarded against:

2d. Excessive damages, appearing to have been given under the influence of passion: or,

3d. Insufficiency of the evidence to justify the verdict or other decision:

4th. Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the time.

623. The application shall be made upon affidavit and notice. The affidavit shall be filed with the Justice, with a statement of the grounds upon which the party intends to rely. The adverse party may use counter affidavits on the motion, provided they be filed one day previous to the hearing of the motion.

624‡. Any party dissatisfied with a judgment rendered in a Justice's Court, may appeal therefrom to the County Court of the county, any time within thirty days after the rendition of judgment. The appeal shall be taken by filing a notice of appeal with the Justice, and serving a copy on the adverse party. The notice shall state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.

625‡¶. When a party appeals to the County Court on questions of law alone, he shall, within ten days from the rendition of judgment, prepare a statement of the case, and file the same with the Justice. The statement shall contain the grounds upon which the party intends to rely

on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments; the proposed statement and amendments shall be settled by the Justice; and if no amendments be filed, the original statement shall be adopted. The statement thus adopted, or as settled by the Justice, with a copy of the docket of the Justice, and all motions filed with him by the parties during trial, and the notice of appeal, shall be used on the hearing of the appeal before the County Court.

626‡. When a party appeals to the County Court on questions of fact, or on questions both of law and fact, no statement need be made, but the action shall be tried anew in the County Court.

627‡¶. Upon receiving the notice of appeal, and on payment of the fees of the Justices, and filing an undertaking as required in the next Section, the Justice shall, within five days, transmit to the Clerk of the County Court: if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed; or if the appeal be on questions of fact or both law and fact, a certified copy of his docket, the pleadings, all notices, motions and other papers filed in the cause, the notice of appeal and the undertaking filed; and the Justice may be compelled by the County Court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the Justice, by the party or his attorney. In the County Court, either party shall have the benefit of all legal objections made in the Justice's Court.

628‡¶. An appeal from a Justice's Court shall not be effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on appeal; or if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property; and shall be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in said action, in the County Court. Where the action is for the recovery of specific personal property, the undertaking shall be conditioned that the appellant will pay the judgments and costs appealed from, and obey the order of the Court made

thereon, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the County Court, and will obey any order made by the Court therein. The undertaking shall be accompanied by the affidavit of the sureties that they are residents of the county, and are each worth the amount specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; or the bond shall be executed by a sufficient number of sureties, who can justify in the aggregate to an amount equal to double the amount specified in the bond, or a deposit of the amount of the judgment including all costs, appealed from, or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice; and such deposit shall be equivalent to filing the undertaking in this Act mentioned, and in such case the justice shall transmit the money to the Clerk of the County Court, to be by him paid out upon the order of the Court.

629. If an execution be issued, on the filing of the undertaking staying all proceedings, the Justice shall, by order, direct the officer to stay proceedings on the same. Such officer shall, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof, as may be necessary to pay the same.

630†. The party appealing shall furnish to the County Court the papers mentioned in Section eleven of this Act, certified by the Justice to be correct.

631‡¶. Costs shall be allowed to the prevailing party in a Justice's Court.

632‡¶. Repealed.

633. Justices of the Peace shall receive from the Sheriff or Constables of their county, all moneys collected on any process or order issued by their Courts respectively, and all moneys paid to them in their official capacity, and shall pay the same over to the parties entitled or authorized to receive them, without delay. For a violation of this Section, they may be removed from their office and shall be deemed guilty of a misdemeanor.

634. Justices of the Peace may, in all cases, require a deposit of

money, or an undertaking, as security for costs of Court, before issuing a summons.

635. The provisions of Sections 519, 520, 523, 525, 526, 527, 531 and 532, shall be applicable to Justices' Courts and actions therein.

TITLE XVII.

OF PROCEEDINGS IN CIVIL CASES IN RECORDERS' AND MAYORS' COURTS.

636. Civil actions in Recorders' and Mayors' Courts shall be commenced by filing the complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation, as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint shall be verified by the oath of the party complaining, or of his attorney or agent.

The Recorder of the City of Sacramento has no jurisdiction in cases of forcible entry and unlawful detainer.—*Cronise* vs. *Carghill*, 4 Cal., 120.

637. Immediately after filing the complaint, a summons shall be issued, directed to the defendant, and returnable either immediately, or at any time designated therein, not exceeding four days from the date of its issuance.

638. On the return of the summons the defendant may plead to the complaint, or he may answer or deny the same. Such plea, answer, or denial, may be oral or in writing, and immediately thereafter the case shall be tried, unless for good cause shown, an adjournment be granted.

639. In all actions for violation of an ordinance where the fine, forfeiture, or penalty imposed by the ordinance, is less than fifty dollars, the trial shall be by the Court. In actions where the fine, forfeiture, or penalty imposed by the ordinance, is over fifty dollars, the defendant shall be entitled, if demanded by him, to a jury of six persons.

640. From a judgment in a civil action in a Recorder's or Mayor's Court, an appeal may be taken to the County Court. The appeal shall be taken and the proceedings thereon conducted in the same manner as

appeals are taken from a judgment in a civil action in a Justice's Court, and as the proceedings thereon are conducted.

641. All proceedings in civil actions in Recorders' and Mayors' Courts, except as herein otherwise provided, shall be conducted in the same manner as in civil actions in Justices' Courts.

642. The provisions of this Title shall be applicable to civil actions in Recorders' and Mayors' Courts already established, or which may hereafter be established in any incorporated city of this State.

TITLE XVIII.

MISCELLANEOUS PROVISIONS.

643. The Supreme Court may make rules not inconsistent with the constitution and laws of the State, for its own government, and the government of the District Courts, and the Superior Court of the City of San Francisco; but such rules shall not be in force until thirty days after their adoption and publication.

644. The County Clerk shall be Clerk of the County Court, the Court of Sessions, and the Probate Court of his county. Until otherwise provided by law, the Clerk of the Superior Court of the City of San Francisco shall be appointed by the said Court.

645. If an action be brought against a Sheriff for an act done by virtue of his office, and he give written notice thereon to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the Court or Judge in vacation may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

646. Whenever a summons, or other process, is served upon a party who is unable to read, or who does not understand the English language, it shall be the duty of the officer making the service to explain to such party the nature of the summons or other process. In the counties of

Santa Clara, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara Contra Costa, Los Angeles and San Diego, it shall be the duty of the officer to give to the defendant, if said defendant shall require it, a copy of the summons or other process in the Spanish language; and in the counties of Santa Barbara, San Luis Obispo, Los Angeles, and San Diego, it shall be lawful, with the consent of both parties, to have the process, pleadings, and other proceedings in a cause, in the Spanish language.

647. Words used in this Act in the present tense, shall be deemed to include the future as well as the present; words used in the singular number shall be deemed to include plural, and the plural the singular; writing shall be deemed to include printing or printed paper; oath to include affirmation or declaration; signature or inscription to include mark when the person cannot write, his name being written near it, and witnessed by a person who writes his own name, as a witness.

648. The following statutes, namely: the Act entitled "An Act to regulate proceedings in civil cases in the District Court, the Superior Court of the City of San Francisco, and the Supreme Court," passed April twenty-second, eighteen hnndred and fifty; the Act entitled "An Act to regulate proceedings against debtors by attachment," passed April twenty-second, eighteen hundred and fifty; the Act entitled "An Act providing for the collection of demands against vessels and boats," passed April tenth, eighteen hundred and fifty; the Act entitled "An Act to regulate proceedings in Courts of Justices of the Peace in civil cases," passed April tenth, eighteen hundred and fifty; and the Act entitled "An Act to regulate proceedings in the County Courts in cases of appeal from the Courts of Justices of the Peace," passed April eleventh, eighteen hundred and fifty; the Act entitled "An Act respecting set-offs," passed April twenty-second, eighteen hundred and fifty, are hereby repealed; but such repeal shall not invalidate any judgment rendered, or order made, or any proceeding already taken by virtue of said statutes.

649. This Act shall take effect on the first day of July of the present year.

650‡. In all cases where an undertaking with sureties is required by the provisions of said Act, the Judge, Justice, Clerk, or other officer taking the same, shall require the sureties to accompany the same with an affidavit that they are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution: *Provided*, that when the amount specified in the under-

taking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.

651‡¶. In actions respecting miners' claims, in a Justice's Court, the Justice shall have power, upon application of the party out of possession of the claim or claims, after notice of one day to the adverse party, to appoint a receiver of the proceeds of the claim, pending the action. If the parties agree upon a person, he shall be appointed such receiver; if the parties do not agree, the Justice shall appoint a receiver, who shall take an oath which shall be filed with the Justice, that he is not interested in the action between the parties, and that he will honestly keep an account of all gold dust or metals of any kind, the proceeds of the claim or claims in dispute. After the appointment of such receiver, the Justice shall have power to issue a written order to any Sheriff or Constable, to put such receiver into possession of such claim, which order said Sheriff or Constable shall execute, and the receiver shall remain in possession of the claim or claims, so long as said action may remain undetermined in any Court. The Court in which the action may be pending, shall have the authority upon the application of either party, with two days' notice to the other, from time to time, to make such orders for the disposition of the proceeds of such claim or claims, for the safety of the same, as may seem proper. The Court in which the action may be pending, shall also have the power, upon application of the receiver, based upon his affidavit, to punish as for contempt, all persons who may have been guilty of disturbing the receiver in the possession of their claims.

See the Appendix "Mining Cases."

652‡. The receiver mentioned in the last Section, shall keep an accurate account of all the proceeds of the claim pending the action, and of all amounts paid out for working the same, and shall retain the proceeds and pay the same over, pursuant to the order of the Court. The receiver shall also be required, on demand of either party, to give security for the faithful performance of his trust, and shall be allowed for the same a reasonable compensation, to be paid out of the proceeds of the claim in his hands, but in no case exceeding ten per cent. upon such proceeds.

653‡. Writs of certiorari and mandamus, may be issued in the cases prescribed by said Act, by a Judge of the Supreme Court, District Court, or County Court, in vacations, and may in the discretion of the Judge

issuing the writ, be made returnable, and a hearing may be had on the return thereof in the vacation.

See Secs. 456, 468.

654‡. Whenever property has been taken by an officer, under a writ of attachment, in pursuance of the provisions of said Act, and it shall be made to appear satisfactorily to the Court, or a Judge thereof, or a County Judge, that the interest of the parties to the action will be sustained by sale thereof, the Court or Judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in Court to abide the judgment in the action. Such order shall be made only upon notice to the adverse party, or his attorney, in case such party have been personally served with a summons in the action.

See Secs. 130, 221.

655‡. A copy of any record, document, or paper in the custody of a public officer of this State, or of the United States, within this State, certified under the official seal, or verified by the oath of such officer, to be a true, full and correct copy of the original in his custody, may be read in evidence in any action or proceeding in the Courts of this State, in like manner and with the like effect, as the original could be produced.

See Secs. 449, 452, 453, 498.

656‡. When two or more persons associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates, but the judgment in such case shall bind only the joint property of the associates.

657‡. All decisions given upon an appeal, in an appellate Court of this State, shall be given in writing, with the reason therefor, and filed with the Clerk of the Court, but this Section shall not apply to actions tried with a jury anew in the County Court, or on appeal from a Justice's Court.

658‡. A defendant against whom an action is pending, upon a contract or for specific personal property, may at any time before answer, upon affidavit, that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon due notice to such person, and the adverse party,

apply to the Court for an order to substitute such person in his place, and discharge him from liability to either party on his depositing in Court the amount claimed on the contract, or delivering the property or its value to such person as the Court may direct, and the Court may, in its discretion, make the order.

659. Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant.

Sustained in *Brooks* vs. *Hager & Lent*, 5 Cal., 44; *Sargeant* vs. *Wilson*, 5 Cal., 86.

660‡. A third person may intervene, either before or after issue has been joined in the cause.

661‡. The intervention shall be by petition or complaint, filed in the Court in which the action is pending, and it must set forth the grounds on which the intervention rests. A copy of the petitions or complaint shall be served upon the party or parties to the action against whom anything is demanded, who shall answer it as if it were an original complaint in the action.

662‡. The Court shall determine upon the intervention at the same time that the action is decided; if the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention.

663‡. On the trial of any action in a Court of Record, either party may require the Clerk to take down the testimony in writing.

A transcript of which, certified by the Clerk is a substitute for a bill of exceptions or statement of facts in their absence.—*Ingraham* vs. *Gildemeester*, 2 Cal., 161.

664‡. The party obtaining the postponement of a trial, in any Court of Record, shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a Judge or Clerk of the Court in which the case is pending, or before such Notary Public as the Court may indicate, which shall accordingly be done, and the testimony so taken may be read on the trial with the same effect, and subject to the same objections, as if the witnesses were produced.

665‡. Whenever costs are awarded to a party by an appellate Court, such party may have an execution for the same on filing a remittitur with the Clerk of the Court below, and it shall be the duty of such Clerk whenever the remittitur is filed, to issue the execution upon application therefor; and whenever costs are awarded to a party by an order of any Court, such party may have an execution therefor in like manner as upon a judgment.

Where a remittitur is sent down, the Clerk of the District Court may issue execution for costs.—"*Marysville*" vs. *Buchanan*, 3 Cal., 212.

666‡. Sections five, six, seven, fifteen, sixteen, seventeen, eighteen, nineteen, and twenty, of the "Act entitled An Act amendatory of and supplementary to the Act entitled An Act to regulate proceedings in civil cases in the Courts of Justice in this State," passed May eighteenth, one thousand eight hundred and fifty-three, are hereby repealed, and the Sections amended by said amendatory Act, shall stand revived and amended by this Act.

667‡. This Act shall take effect on the first day of July, one thousand eight hundred and fifty-four.

APPENDIX.

CONTAINING LATE DECISIONS UPON THE CONSTRUCTION OF THE "HOMESTEAD ACT," AND THE "LAW OF MINERS" AND THE RULES OF THE SUPREME COURT.

HOMESTEAD.

ABANDONMENT OF HOMESTEAD — HOW CONSTRUED —

The removal of husband and wife from a homestead thus selected, after and in consequence of sale and conveyance by the husband, in which the wife did not join, furnishes no evidence of an abandonment of the homestead by her, but seems to be the very case against which the Statute intended to provide.—*Taylor vs. Hargous*, 4 Cal., 268.

ACKNOWLEDGMENT OF DEED —

The wife must acknowledge the execution apart from her husband; the separation of husband and wife during the acknowledgment cannot be waived.—[Superior Court, August, '55, *Philips vs. Robinson.*

ACT — OPERATION OF —

The homestead act does not apply to and affect property acquired previous to its passage.—*Cook vs. Mc Christian*, 4 Cal., 23; *Schouton vs. Kilmer*, 8 P. R. 527.

DEDICATION OF HOMESTEAD —

The fact of the dedication of the premises in question as a homestead, was properly submitted to the jury.—*Cook vs. Mc Christian*, 4 Cal., 23.

DEED — REQUISITES OF THE —

The wife and husband must join in the same deed to dispose of the homestead.— *Poole vs. Gerrard*, Cal. Jan'y T., 1856.

DOMICIL — see RESIDENCE —

The domicil of the wife is with the husband; and if the wife does not reside in the State, the mortgage deed must have the signature of the wife to encumber the homestead.—*Benedict vs. Brummell*, Superior Court; contra, *Cary vs. Tice*, 12, Dist. Court.

DWELLING PLACE —

The homestead is the dwelling place of the family, where they permanently reside, and, by Common Law, such residence raises the presumption that the premises so held are the homestead, and every one is bound to take notice of the character of the occupant's claim.—*Cook vs. McChristian*, 4 Cal., 23.

EVIDENCE — see OCCUPANCY —

JOINT TENANCY — EXISTS IN HOMESTEAD BETWEEN MAN AND WIFE —

It becomes a sort of joint tenancy, with the right of survivorship, as between husband and wife, and this estate cannot be altered or destroyed, except by the concurrence of both, in the manner provided by law, unless it be in favor of an innocent purchaser without notice.—*Taylor vs. Hargous*, 4 Cal., 268.

NO HOMESTEAD CAN EXIST IN A JOINT TENANCY, OR TENANCY IN COMMON —

There exists no homestead in a joint tenancy or tenancy in common. —*Davis vs. Fleishhacker*, 5 Cal., 57.

JURY — see DEDICATION —

LIABILITY FOR EXCESS OVER $5,000 —

In an action of ejectment the purchaser of the homestead from the husband without the concurrence of the wife is not entitled to recover the excess of its value over $5,000.—*Cook vs. McChristian*, 4 Cal., 23.

NOTICE BY RECORD OF HOMESTEAD —

In the absence of any Statute regulation, requiring a record of the homestead, or indicating any mode in which the intention to dedicate property as a homestead shall be made known, the filing of a notice in the Recorder's office of the County could have no legal effect and would not be conclusive on purchasers or creditors.—*Cook vs. McChristian*, 4 Cal., 23.

OCCUPANCY —

Occupancy by the family is presumptive evidence of the appropriation of a place as a homestead, and is consequently notice to all the world. —*Taylor vs. Hargous*, 4 Cal., 268.

PROPERTY—THERE CAN BE BUT ONE HOMESTEAD—

In the case of the successive occupancy of several places as residences, the recovery of any one of them by the wife, as a homestead, would bar her recovery of any other as such.—*Taylor vs. Hargous*, 4, Cal., 268.

HOW ACQUIRED IS IMMATERIAL—

As soon as a place acquires the character of a homestead, it is immaterial how the property originated, whether it was the separate property of husband, or wife, or the common property of both.—*Taylor vs. Hargous*, 4 Cal., 268.

RECORDING—see NOTICE—

RESIDENCE—see PROPERTY, DWELLING PLACE—

If a person owns but *one* piece of land, though he never resided there, he can claim it as his homestead.—*Mayer vs. Adler*, Superior Court.

SINGLE MAN CANNOT CLAIM HOMESTEAD—

An unmarried man is not entitled to a homestead.—*Markwald vs. His Creditors*; Judge Norton sitting as Judge of the 4th Dist. Court.

TENANCY IN COMMON—see JOINT TENANCY—

MINERS AND MINING.

ASSOCIATIONS—AS TO CERTIFICATES OF STOCK—

Water Companies can issue certificates of stock as evidences of their indebtedness.—*Mayer & Beals vs. Mokelumne Hill Canal Co.*, 5 Cal., 55.

ARTICLES OF AGREEMENT—

Von Schmidt, one of the Plaintiffs, having failed to join the Company within a reasonable time, it seems that his labor-stock became forfeited, under one of the clauses in the Articles of Association, which declared absence without leave to be a cause of forfeiture, and the other Plaintiffs having deserted the Company; Held, that a resolution of the Company declaring their money shares, as well as labor shares, to be forfeited, was valid under the Articles of Association.—*Von Schmidt vs. Huntington*, 1 Cal., 55.

PARTIES TO A SUIT—

As a general rule, all persons materially interested in the subject matter of a suit ought to be made parties; but where the parties in interest are numerous, a court will allow a suit to be brought by some of them in behalf of themselves and others, taking care that there shall be a due representation of all substantial interests before the court.

Thus where the stock of a joint stock company was divided into money shares and labor shares, and certain holders of the latter description of stock brought suit against certain holders of the former description of stock, without all the persons of either class being made parties; Held, the stockholders being numerous, and it being difficult, if not impracticable, to bring them all into court, that the parties before the court were sufficient to authorise it to adjudicate upon their rights, and dissolve the company, and decree a distribution of its effects.—*Von Schmidt vs. Huntington*, 1 Cal., 55.

DISSOLUTION OF—

A joint stock association was formed in the city of New York, called the "New York Union Mining Company," for the purpose of prosecuting the business of mining in California, and the period during which the company was to continue business was, by the Articles of Association, to be from January 1st, 1849, to October 1st, 1853, with a prohibition against dissolution within one year of the arrival of the company in California, except on certain conditions, which had not been complied with; Held, that a portion of the company could not, contrary to the Articles of Association, dissolve the company at their will and pleasure; but it being found impracticable to keep the company together or to prosecute successfully the contemplated enterprise, under the Articles of Association, the court decreed a dissolution, and the distribution of the effects of the company.—*Von Schmidt vs. Huntington*, 1 Cal., 55.

A joint stock association formed for a definite period cannot be voluntarily dissolved, except by the unanimous consent of all the stockholders; if such consent cannot be had, then application must be made to a court to decree a dissolution.—*Von Schmidt vs. Huntington*, 1 Cal., 55.

COMPANIES—see ASSOCIATIONS—

CUSTOM AS TO POSSESSION—

Actual possession of a portion of a mining claim, according to the custom of miners, in a given locality on the Yuba River, extends by construction to the limits of the claim, held in accordance with such customs. *Hicks vs. Bell*, 3 Cal., 219.

DISPOSSESSION UNDER EXECUTION—

Where the tax collector levied on the property of the partnership, for the tax due by the foreigner thus employed, and sold the whole claim, and dispossessed the Plaintiff (one of the partners;) Held, that he was guilty of a trespass, for which this action was properly brought.—*Meyer vs. Larkin*, 3 Cal., 403.

EXECUTION—see DISPOSSESSION—

FEES PAID TO COUNSEL—

It being the interest af all parties concerned that the company should be legally dissolved; Held, that the costs and a counsel fee on each side should be paid out of the funds.—*Von Schmidt vs. Huntington*, 1 Cal., 55.

JURISDICTION—OF DISTRICT COURTS—

The jurisdiction of the District Court is confirmed and defined by the Constitution, and no statute can deprive it of its powers.—*Hicks vs. Bell*, 3 Cal., 219.

In a suit brought by one of the partners in a mining company against the company to recover his share which had been sold for an alleged non-payment of an assessment and also to recover the sum of $2027, his proportionate share of the gold taken out by the said company, the District Court has jurisdiction.—*Schuyler vs. Evans*, 4 Cal., 212.

OF JUSTICES OF THE PEACE—

Although the jurisdiction of mining claims is given to Justices of the Peace, that of the District Court remains unaffected if the amount in controversy exceeds $200.—*Hicks vs. Bell*, 3 Cal., 219.

LABOR SHARES TO BE PAID IN PROPORTION TO LABOR ONLY—

The stock being divided into money shares and labor shares, the holders of the latter of which had contributed no capital towards the outfit of the company, had performed no labor beneficial to the company, and had their expenses to California paid out of the funds contributed by the holders of the money shares; Held, that the assets of the company should be distributed among the holders of the money shares alone.—*Von Schmidt vs. Huntington*, 1 Cal., 55.

LICENSE—see TAX—

STATE SOVEREIGNTY—see also TAX—

The mines of gold and silver in the public lands are as much the property of the State, by virtue of her sovereignty, as are similar mines in the hands of private proprietors.—*Hicks vs. Bell*, 3 Cal., 219.

POWER OF THE UNITED STATES—

The United States as owner of land within the limits of a State, only occupies the position of any private proprietor, with the exception of exemption from State taxation.—*Hicks vs. Bell*, 3 Cal., 219.

STOCKS IN MINING CLAIMS—see ASSOCIATION, LABOR SHARES—

TAX — LIABILITY FOR FOREIGN —

When a foreign miner, subject to a license tax, was employed by one of a partnership to work in the mines which were the partnership's property, held, that the employer and not the partnership was liable for the tax. —*Meyer vs. Larkin*, 3 Cal., 403.

The State, therefore, has the sole right to authorise them to be worked, to pass laws for their regulation, or license miners and to affix such terms and conditions, as she may deem proper to the freedom of their use. —*Hicks vs. Bell*, 3 Cal., 219.

The State has the power to require the payment by foreigners of a license fee for the privilege of working the gold mines in the State.— *The People vs. Naglee*, 1 Cal., 232.

The Act of the Legislature prohibiting foreigners from working the gold mines except on condition of paying a certain sum each month for the privilege, held not to be repugnant to the Constitution of the United States, or the Constitution of the State, or the treaties of the United States with foreign powers.— *The People vs. Naglee*, 1 Cal., 232.

WATER COURSES — DAMAGES BY —

The question, "What has been the damages sustained by diversion of this water for irrigation purposes," is objectionable.—*Jarvis vs. Fountain Water Co.*, 5 Cal., 46.

APPENDIX.---ADDENDA.

HOMESTEAD.

FRAUD IN THE CONVEYANCE —

A sale to discharge debts which are liens or charges upon the homestead, for the purposes of saving it to himself, of which the purchaser is aware, will be set aside.—*Riddell vs. Shirley*, 5 Cal., 82.

JOINT TENANCY —

Joint tenancy in the homestead may exist in favor of the wife and children of one family deriving title through her husband and their father. —*Giblin & Kelly vs. Jordan*, Superior Court.

LIABILITY FOR EXCESS OVER $5,000 —

The want of the signature of the wife to the mortgage does not render the mortgage absolutely void, but only void as to the homestead value. The husband can dispose of, in any manner, the excess over $5,000.— *Sargeant vs. Wilson*, 5 Cal., 86.

LIABILITY FOR PURCHASE MONEY —

While the land is chargeable for the purchase money, that charge cannot be evaded by the execution of any new mortgage designed to secure the same debt. In that event, however, only the purchase money and interest remaining due can be made out of the lot and for the excess the plaintiff must proceed on his other security, or against the party, but not against the homestead.—*Dillon vs. Byrne et Byrne*, 5 Cal., 72.

MINERS AND MINING.

ASSOCIATIONS —

Stockholders being liable for the debts are incompetent witnesses on behalf of the association.—*McAuley vs. York Mining Co.*, 6 Cal., Jan'y T.

INJUNCTION—

An injunction should not be granted to prevent the cutting of a ditch through land.—*Waldron vs. Marsh*, 5 Cal., 9.

JURISDICTION OF JUSTICES OF THE PEACE—

A Justice of the Peace has no power conferred on him to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted.—*Hill vs. Newman*, 5 Cal., 71.

Justices can entertain a suit for a mining claim, and the prayer for damages might be stricken out or disregarded.—*Vannelton vs. Jilson*, 6 Cal., Jan'y T.

POSSESSION OF WATER RIGHTS—LOSS OF USUFRUCT—

If the water of stream A be diverted from its natural channel by C, and used by him, and then flows from his works into stream B by natural channels it is lost to its first possessor, and he cannot reclaim it on the ground that the water of stream B was increased by his means.

The foundation to a water right is first possession; and the right is usufructuary, and consists not so much in the fluid itself as in its own use. The owner of land over which it flows has the right to its use during its passage. The right is not in the water, but only continues with its possession. When the water of a stream leaves the possession of a party, all his right to, and interest in it, is gone; the use of it will then belong to whomsoever is using the water of the other stream.—*Eddy vs. Simpson*, 3 Cal., 289.

STOCK—

No transfer of stock is good against third persons as attaching creditors, unless made on the books of the association.—*Weston vs. Bear River and Auburn Water Co.*, 5 Cal., 29.

TITLE TO—HOW ACQUIRED—

The State has conferred the privilege to work the mines, and also the right to divert the streams from their natural channels, for mining purposes, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority, upon the maxim of equity, *quis prior est in tempore, prior est in jure.* The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, (id est, the diversion of the stream above for mining purposes).—*Irwin* vs. *Philips*, 5 Cal., 21; *Tartar* vs. *Spring Creek W. Co.*, 5 Cal., 78; *Burge* vs. *Underwood*, 6 Cal., Jan'y T.

Persons settled in good faith upon lots in the mining towns, and carry-

ing on business, should be reasonably protected from trespass by miners. —*Fitzgerald vs. Urton*, 5 Cal., 57; *Tartar vs. Spring Creek W. Co.*, 5 Cal., 78; *Burge vs. Underwood*, 6 Cal., Jan'y T.

A party cannot acquire a right to mineral lands for agricultural purposes, from the government of the United States.—*Mc Clintock vs Bryden*, 5 Cal., 16.

AND ALSO RIGHT TO WORK THE MINES —

All persons may work the mines upon public lands, notwithstanding that they may be in the possession and enjoyment of another for agricultural purposes.—*Stokes vs. Barrett*, 5 Cal., 8; *Mc Clintock vs. Bryden*, 5 Cal., 16; *Tartar vs. Spring Creek W. Co.*, 5 Cal. 78; *Burge vs. Underwood*, 6 Cal., Jan'y T.

SEE TRESPASS—

TRESPASS—

The entry for mining purposes upon mining land enclosed for agricultural purposes in this State, is not a trespass, but the pursuit of a lawful and honorable calling.—*Mc Clintock vs. Bryden*, 5 Cal., 16.

REMOVAL OF OBSTRUCTIONS —

Parties first appropriating to themselves the water of a ravine for mining purposes, may peaceably remove a dam subsequently erected thereon, if it obstructs their use of the flowing water for such mining purposes, and for carrying off their tailings.— *Laird vs. Stiles & Davis*, 5 Cal., 18.

See INJUNCTION—

WITNESS—see ASSOCIATION—

RULES OF THE SUPREME COURT

OF CALIFORNIA.

I. To entitle a person to practice as an Attorney and Counselor of this Court, he must first be admitted as such. Any white male citizen of the age of twenty-one years, of good moral character, and who possesses necessary qualifications of learning and ability, shall be entitled to admission as Attorney and Counselor of this Court.

II. Every applicant for admission as an Attorney and Counselor shall produce satisfactory testimonials of good moral character, and undergo an examination in open Court, as to this qualification, by a Justice of this Court, except that in the case of a person who has been admitted as an Attorney and Counselor in the highest Courts of any other State; his affidavit of such admission or his license showing the same, (where his license can be produced) shall be deemed sufficient to entitle him to admission.

III. In all cases where an appeal is perfected twenty days before the commencement of the next succeeding term of this Court, the transcript of the Record in the Court below shall be filed on or before the first day of such term; in all other cases, twenty days from the time of perfecting the appeal. Provided, however, that if at the time of perfecting such appeal further time be allowed for the filing of the statement of the case under the 338th section of the Practice Act, then the transcript shall be filed within twenty days after the perfecting and filing of such statement, if the same is filed in time, or within twenty days after the time for filing such statement has expired.

II. If the transcript is not filed within the time prescribed, the appeal may be dismissed on motion of any party in interest, without notice, upon satisfactory evidence of the omission. A cause so dismissed may be restored during the same term, upon good cause shown, and notice to the

opposite party, and unless so restored, the dismissal shall be final, and a bar to any other appeal in the same cause.

V. Satisfactory evidence of the omission to file the transcript referred to in Rule Third, shall be deemed to be the certificate of the Court below under the seal of the Court certifying the amount or character of the judgment, the date of its rendition, and that no appeal has been taken, with the time when perfected, and also that the Appellant has received the transcript, or that he has not directed a transcript of the Record to be made out, or if he has given such direction that he has not tendered the fees therefor.

VI. When the Appellant fails to file his transcript of the Record within the time prescribed, the Respondent, instead of moving for a dismissal, may himself file the transcript, and require the Appellant to file his statement of points. In default whereof, on the part of the Appellant, the Court will (if there be no error) affirm the judgment of the Court below. If the Appellant file his statement, the cause shall proceed as in other cases.

VII. All transcripts of Records hereafter sent to this Court, shall be on paper of uniform size, according to a sample to be furnished by the Clerk of the Court, with a blank margin one and a half inches wide at the top, bottom and sides of each page.

VIII. The pages of the transcripts shall be numbered, and shall be written but upon one side of the leaves.

IX. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order, or proceeding, and shall have at least one blank or fly sheet cover.

X. Marginal notes of each separate paper, order or proceeding shall be made throughout the transcript.

XI. The transcript shall be fastened together on the left side of the pages, by ribbon or tape, so that the same may be secured, and every part conveniently read.

XII. The transcript shall be written in a fair legible hand writing, and each paper or order shall constitute at least one paragraph.

XIII. No Record which fails to conform to these rules shall be received or docketed by the Clerk of this Court.

XIV. For the purpose of correcting any error or defect in the transcript of the Record from the Court below, either party may suggest the same to this Court, and upon good cause shown, obtain an order that the proper Clerk certify to this Court the whole or a part of the Record, as may be required.

XV. Upon the death or other disability of a party, pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, to the Court, on the part of such representative, or of any party on the Record. Upon the entry of such suggestion, an order of substitution will be made, and the cause shall proceed as in other cases.

XVI. To entitle a cause to be put upon the Calendar for hearing, the transcript must be filed, and notice of the filing of the transcript and of argument must be given five days before the commencement of the term. The Calendar for each term shall contain only those causes in which the transcript shall have been filed five days before the commencement of the term, and they shall be put upon the Calendar in the order in which the transcripts were filed.

XVII. To entitle the Appellant to bring the cause to a hearing at any term, the statement of his points and authorities shall be filed five days before the hearing. Additional points may be filed at any time by leave of the Court or the consent of the parties. The argument before the Court shall be confined to the points on file.

XVIII. On the first day of the term, the Court will call the Calendar and set down the causes for each day. Every case when called must be argued, dismissed or continued for the term, except cases which the Court is unable to hear by reason of preceding cases having occupied the whole day, which shall be again set by the Court.

XIX. The first and second week of the term, or so much time commencing with the first week as may be necessary, shall be devoted exclusively to the hearing of appeals coming from the counties other than San Francisco.

XX. Not more than ten causes shall be apportioned under Rule XVIII for any day of the week.

XXI. Causes in which the people of the State are a party, and a citizen is confined in prison, may be called, on motion of the Attorney General, at any time, upon due notice to the opposite party; and for this purpose all such causes shall have precedence on the Calendar.

XXII. Upon a suggestion in writing to the Court, and upon cause shown that an appeal has been taken merely for delay, the Court may order the same to a hearing without reference to its place upon the Calendar.

XXIII. But one notice of argument shall be required in the same cause.

XXIV. Before proceeding with the argument of any cause, or of any

motion of which notice is required to be given, the party moving shall read to the Court the notice and acknowledgment of service.

XXV. Before the argument, both the Appellant and Respondent shall furnish to each other and to each of the Justices of this Court, a copy of his points and authorities, or either party may file one copy thereof with the Clerk, who shall cause to be made the copies required for the use of the Court, and may tax the same in his bill of costs.

XXVI. Appeals from judgments rendered by Courts of First Instance shall be placed upon the Calendar, and brought to a hearing in the mode prescribed by section 277 of the Practice Act, approved April 22, 1850.

XXVII. No more than two Counsel on a side will be heard upon the argument, except in peculiar and important cases, but each defendant who has appeared separately in the Court below, may be heard through his own Counsel. The Counsel for the Appellant shall be entitled to open and close the argument.

XXVIII. All opinions delivered by the Court shall be recorded by the Clerk, who shall, after recording the same, deliver the originals with a transcript of the judgment, order or decree of the Court thereon, to the Reporter of this Court. The Clerk to be allowed forty cents per folio, to be taxed in the costs of each case.

XXIX. All motions for re-hearing, shall be upon petition, in writing, presented within ten days after any final judgment or order of the Court is delivered, and no argument will be heard thereon. No mandate to the Court below shall be issued until the expiration of the ten days herein provided, unless upon good cause shown, and upon notice to the other party.

XXX. When a re-argument is ordered, it shall be had during the same term at which it is ordered; unless otherwise directed by the Court.

XXXI. On the reversal of a judgment, a copy of the opinion delivered by the Court, certified by the Clerk, shall be transmitted to the Court below.

XXXII. When a trial is awarded upon an appeal from a judgment of a Court of First Instance, the order shall specify the county in which the new trial shall take place, and the papers shall be remitted to the Clerk of that County.

XXXIII. The party in whose favor a special motion is decided shall, unless otherwise ordered, be allowed the costs of the motion, which shall consist of his necessary disbursements is preparing the papers for the motion and bringing the same to a hearing, besides the costs (if any) allowed by law.

XXXIV. In all cases placed upon the Calendar, or otherwise brought before this Court by the Appellant, the costs of Court shall be paid by the Appellant. In all cases placed upon the Calendar, or otherwise brought before this Court by the Respondent, the Respondent shall be first liable for the costs of Court and the Appellant shall also be liable. In all cases placed upon the Calendar, or otherwise brought before this Court by consent, the Appellant shall be first liable for the costs, and the Respondent shall also be liable. In no case shall the Clerk be required to remit the final papers in any cause until the costs of this Court therein are paid.

XXXV. All notices and papers, whereof service is required in a suit, shall be served on the Attorney of the party, if he has appeared by Attorney. Such service shall be made upon the Attorney of Record in the Court below, unless the parties shall have appeared in this Court by a different Attorney.

XXXVI. All notices shall be in writing. Notices and papers shall be served as follows:

1st, Personally; or,

2d, During the absence of the Attorney from his office, by leaving the same with his clerk in the office, or with a person having charge thereof; or,

3d, When there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or,

4th, If the office is not open, so as to admit of such service therein, by leaving them at the Attorney's residence, with some person of suitable age and discretion; or,

5th, If the Attorney's residence is not known, by putting the same, enclosed in an envelope, into the nearest Post Office, directed to such Attorney.

XXXVII. If a party has not appeared by Attorney, service shall be made upon him as follows:

1st, Personally; or,

2d, By leaving the notice or other papers at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; or,

3d, If his residence is not known, by putting the same, enclosed in an envelope, into the nearest Post Office, directed to the party.

XXXVIII. Service by mail may be made where the person making the service and the person on whom it is to be made reside in different places, between which there is regular communication by mail. Such service shall be made by depositing in the Post Office the notice or other

paper, addressed to the person on whom it is to be served, at his place of residence, and postage paid. The time of service shall be increased one day for every twenty miles distance by the nearest post route between the place of deposit and the place of address.

XXXIX. On process or papers to be served, the Attorney (or the party, if he has no Attorney) shall, besides endorse or subscribe his name and his place of business or residence. If he neglect to do so, papers may be served on him through the Post Office, directing them according to the best information that can conveniently be obtained.

XL. Whenever a stay of proceedings is necessary, in order to make a special motion, a Justice of this Court or District Judge, may grant an order for the purpose. Service of such order, with copies of affidavits on which it has been granted, and notice of the motion, shall operate as a stay of proceedings until the motion can be made according to the practice of the Court, and if made, until the decision of the Court thereon.

XLI. No private agreement or consent between the parties or their Attorneys in a cause, or in respect to the proceedings therein, shall be binding, unless the same is in writing and subscribed by the party or his Attorney, (in all cases where he has an Attorney) against whom the same is alleged, and filed with the Clerk.

XLII. No paper filed with the Clerk of this Court shall be taken from the Supreme Court room or Clerk's office, except by order of the Court, and the Clerk will be responsible for the safe-keeping of all papers filed with him.

XLIII. In any case where a decision is made on a writ of habeas corpus, either party may take an appeal or writ of error to bring the case before the Supreme Court, in the same manner as other cases are brought up.

XLIV. Where an appeal or writ of error is taken from a decision of any Judge, such decision, or the order made thereupon, shall be superceded in the same manner and to the same effect as judgments and decrees made by any Court of Record.

XLV. A writ of error shall be issued by the Clerk of this Court upon the filing with him of an affidavit, by or in behalf of the party applying for the writ, showing that there is a judgment to be reviewed, describing it, and also that there is a proper case for the issuing of a writ.

XLVI. Upon the delivery of a writ of error to the Clerk of the Court below, in which the judgment sought to be reviewed has been entered, and the filing with him and perfecting of a sufficient bond, and upon notice in writing of the allowance of the writ and the filing and perfecting of the

bond given by the party suing out the writ to the opposite party or to his Attorney, and to the Sheriff, the writ shall operate as a supersedeas, and shall stay all proceeding under the judgment, and under the execution if one has been issued. The bond shall be given by the party suing out the writ with two sureties, or,where the party is absent, or for any other cause cannot join therein, with three sureties, to the adverse party in the judgment to be reviewed. As to its amount, conditions, allowance, notice of filing justification of sureties, and all other requisites, it shall comply as nearly as may be with the provisions of the Civil Practice Act in reference to the undertakings upon appeal from the District Court to this Court. Until the bond is perfected by the justification of the sureties or the substitution of others, the writ of error shall not operate to stay proceedings.

XLVII. The writ of error shall be returnable, at the utmost, within thirty days, and, until the return day thereof, there shall be no motion to amend or quash the same.

XLVIII. The rules and practice of this Court respecting appeals under the Statute, shall apply, so far as the same may be applicable, to proceedings under a writ of error.

XLIX. The writ of error shall not be allowed after the lapse of one year from the rendition of the judgment, order or decree which is sought to be reviewed.

L. When an issue of fact is joined in the Probate Court it shall be the duty of the Probate Judge to certify the said issue for trial to the District Court, where it shall be tried like any other issue of fact in the District Court.

LI. After the trial of such issue, the District Court shall remit the proceedings upon such trial to the Probate Court, which proceedings shall form part of the Record of the cause in the Probate Court.

LII. The Probate Court shall render judgment according to the finding of the issue by the District Court.

LIII. In appeals to this Court from the Probate Court the Appellant may assign errors upon the proceedings of the District Court in the trial of any issue of fact.

LIV. It is ordered that all rules of practice adopted antecedent to those adopted at the present term of this Court, be, and the same are hereby abrogated.

I, P. K. Woodside, Clerk of the Supreme Court of the State of California, do hereby certify the foregoing to be a true copy of the Rules of the Supreme Court of California, adopted at the October term, A. D. 1854.

P. K. WOODSIDE, Clerk.

RULE BY THE CLERK.

In future, no transcript of record from a lower Court will be filed in the Supreme Court unless accompanied by thirty dollars in cash.

J. R. BEARD, Clerk.

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